IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OREGON & CALIFORNIA RAILROAD COMPANY, a corporation,
Complainant-Appellant,

vs.

MARIA DE GRUBISSICH, NEE MARIA DE POURTALES,
Defendant-Appellee.

2181

Appeal from the District Court of the United States, for the District of Oregon.

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BRIEF FOR COMPLAINANT--APPELLANT

STATEMENT OF FACTS.

This suit involves the legal title to certain real property situated in Clackamas County, State of Oregon, and more particularly described as follows, to-wit:

The East Half of the Southeast Quarter, and Lots five and six of Section twenty-nine, and the North Half of the Northeast Quarter of Section thirty-two, Township one South of Range two east of the Willamette Meridian.

On or about the 22nd day of April, A. D. 1867, a corporation was organized under the general incorporation laws of the State of Oregon, under the name of the Oregon Central Railroad Company, for the purpose of building and operating a railroad from Portland, Oregon, southward to the California State line.

On or about the same date, the said corporation entered into an agreement with one S. G. Elliott, who was acting for A. J. Cook, whereby S. G. Elliott and A. J. Cook were to construct its first one hundred and fifty miles of railroad. This contract was supplemented and modified thereafter by another contract of date November 27, 1867, and at this time a co-partnership was formed by S. G. Elliott and A. J. Cook under the name of A. J. Cook and Company. That the firm of A. J. Cook and Company, by and through S. G. Elliott, contracted with the Oregon Central Railroad Company for the completion of its road from the terminus of the first one hundred and fifty miles to the California state line. Construction work under this contract, breaking ground, etc., was commenced on or about the 17th day of April, 1868, by S. G. Elliott for and on behalf of A. J. Cook and Company, and was continued by S. G. Elliott and A. J. Cook and Company until on or about the 15th day of September, 1868, when all contracts entered into by and between A. J. Cook and Company and the Oregon Central Railroad Company for the building of its railroad were assumed by consent of all

parties thereto, by a co-partnership styled Ben Holladay and Company and which had theretofore been formed for the express purpose of constructing, owning and operating railroads.

The firm of Ben Holladay and Company was composed of Ben Holladay, S. G. Elliott and C. Temple Emmet.

The primary purpose for which the co-partnership of Ben Holladay and Company was formed, was to complete the work of constructing the railroad for the Oregon Central Railroad Company which had been commenced by A. J. Cook and Company.

Soon after assuming the contract entered into between the Oregon Central Railroad Company and A. J. Cook and Company, and on or about the 19th day of November, 1868, the firm of Ben Holladay and Company purchased from William Showers and James Grindley all of the timber on the lands above described, and thereafter and before removing the timber, purchased the said lands, including the timber, securing a deed of date May 4, 1869, from James Grindley for the East Half of the Southeast Quarter and lots numbered five and six of section twenty-nine, township one south, range two east of the Willamette Meridian, and thereafter another deed of date October 5th, 1869, from Gardner Elliott and wife for the North Half of the Northeast Quarter of section thirty-two, township one south, range two east of the Willamette Meridian. At the time the firm of Ben Holladay and

Company purchased the timber on the above described lands, and the right to erect mill sites thereon, the legal title was still vested in the United States. Patents were not issued until on or about the dates the deeds were executed, towit, the 4th day of May, 1869, and October 5th, 1869 thereafter. The lands so acquired were covered with a heavy growth of fir timber suitable for ties, bridge timbers, etc., necessary and indispensable for railroad construction, and said lands were so situated with reference to the railroad as to be very convenient for the location of the necessary saw mills for manufacturing the timber thereon into ties, etc. All of the timber on the lands above described was manufactured into ties, bridge timbers, etc., and was used in constructing the first twenty miles of railroad, which was the only part of the work undertaken by the firm of A. J. Cook and Company under their contract with the Oregon Central Railroad Company and which contract was assumed by the firm of Ben Holladay and Company, that was done by Ben Holladay and Company, notwithstanding that Ben Holladay and Company were to completely perform the contract by building the road to the California state line.

On or about the 15th day of September, 1869, prior to the completion of the first twenty miles of road, the firm of Ben Holladay and Company abandoned the contract entered into by and between A. J. Cook and Company and the Oregon Central Railroad Company and which was assumed

by Ben Holladay and Company, to build the road to the California state line, and with the consent of the Oregon Central Railroad Company and on said date, a new agreement was entered into whereby Ben Holladay and Company were released from all obligations and undertakings by reason of their having assumed the said A. J. Cook and Company contract. As a part of this agreement, the Oregon Central Railroad Company was required to assign and set over unto the firm of Ben Holladay and Company all of its outstanding stock, bonds, franchises and other property of every kind or nature, as security for the payment of all sums of money which had been expended and which might thereafter be expended by the firm of Ben Holladay and Company in building said twenty miles of railroad south of the City of Portland.

At the time this agreement of September 15, 1869 was made, the Oregon Central Railroad Company was having considerable difficulty in selling its bond issue owing to an attack being made upon its right to the use of the name of Oregon Central Railroad Company, another company having theretofore adopted the same name. It was also being attacked upon the ground that it was not a legally organized corporate body.

By this agreement of September 15, 1869, the Oregon Central Railroad Company virtually became the property of Ben Holladay and Company, and its destinies were in the care and keeping of the firm of Ben Holladay and Company, which was

a co-partnership dominated and controlled by Ben Holladay.

On or about the 5th day of November, 1869, Ben Holladay caused to be instituted a suit for the dissolution of the firm of Ben Holladay and Company, in which he and one C. Temple Emmet were plaintiffs, and S. G. Elliott and others were defendants.

Thereafter, towit, on or about the 25th day of December, 1869, and prior to the determination of the dissolution suit above mentioned, the firm of Ben Holladay and Company completed the first twenty miles of railroad for the Oregon Central Railroad Company, which was by the terms of an act of Congress dated July 25, 1866, the time within which the first twenty miles was to be completed as a condition precedent to acquiring the lands granted by this act, which was an act in aid of the construction of a railroad "from the Central Pacific Railroad in California, to Portland, in Oregon," and thereafter, towit, on or about the 28th day of March, 1870, an agreement was executed by Ben Holladay, C. Temple Emmet by Ben Holladay attorney in fact, as individuals, and by Ben Holladay and Company by Ben Holladay, wherein Ben Holladay and Company agreed for a good and valuable consideration, to transfer and deliver various and sundry articles of personal property enumerated in said agreement unto the Oregon Central Railroad Company, and in addition thereto specifically agreed to transfer and convey all leases and real property now owned or possessed by them in the State of Oregon, stating

that all of this property was located principally in the counties of Multnomah and Clackamas in said state.

On the same date that this agreement was executed and delivered, a proposition was submitted to the president of the board of directors of the Oregon Central Railroad Company by Ben Holladay as president of the Oregon and California Railroad Company, which proposition was in the form of a resolution passed by the board of directors of the Oregon and California Railroad Company on the 26th day of March, 1870, and which in substance was an offer upon the part of the Oregon and California Railroad Company to purchase the franchise of the Oregon Central Railroad Company, and in addition thereto all of its real property and personal property of every kind and nature wherever situated. The consideration to be paid for such property was simply the promise and undertaking on the part of the Oregon and California Railroad Company to assume and pay all the debts and liabilities of the Oregon Central Railroad Company and to indemnify and forever keep harmless the Oregon Central Railroad Company from any and all such payments and from all liability whatsoever of every name and nature, for which the Oregon Central Railroad Company might be liable at the date of the acceptance of the said proposition. The principal indebtedness of the Oregon Central Railroad Company at this time was its indebtedness to the firm of Ben Holladay and Company in the sum of about eight hundred

thousand dollars ($800,000.00) for the construction of the first twenty miles of road.

This proposition was accepted by the Oregon Central Railroad Company on the same day (March 28, 1870) and an agreement for the sale of all of the property of every kind and nature of the Oregon Central Railroad Company was executed immediately thereafter and on the same date, and in pursuance of a call for a special meeting of the stockholders of the Oregon Central Railroad Company issued by authority of a resolution passed by the board of directors of the Oregon Central Railroad Company on the 14th day of March, 1870, prior thereto, and called for the purpose of authorizing a dissolution of the Oregon Central Railroad Company, a special meeting was held. At this meeting it was decided by a majority vote of all the stockholders present, that the Oregon Central Railroad Company as a corporation should be dissolved.

At the time of the dissolution of the Oregon Central Railroad Company it appears that *Ben Holladay and Company* was the *owner of all but eleven shares of the capital stock of the Oregon Central Railroad Company.*

The 28th day of March, 1870, is to be remembered as an eventful day in the history of this controversy for the reason that three events took place upon this date which have considerable bearing upon the issues in this suit, as it was upon this date that the agreement to convey the real property

in dispute here to the Oregon Central Railroad Company was executed—the purchase by the Oregon and California Railroad Company of the Oregon and Central Railroad Company, which carried with it the lands involved here, and the dissolution and death of Oregon Central Railroad Company, which was owned and controlled by Ben Holladay and Company, and which was resurrected and given new life by Ben Holladay under the title of Oregon and California Railroad Company, a corporation organized, controlled and dominated by Ben Holladay personally.

The Oregon and California Railroad Company went into possession of all the property acquired from the Oregon Central Railroad Company on or about the 29th day of March, 1870, of which the lands in controversy here were a part. The dissolution suit commenced by Ben Holladay and C. Temple Emmet against S. G. Elliott et al., on or about the 5th day of November, 1869, was still pending, and during the time intervening between the said 5th day of November, 1869, and the 15th day of August, 1879, the date upon which the issues therein were finally determined, the deposition of Ben Holladay was taken on two occasions, first, on the 27th day of December, 1870, and the second on the 3rd day of April, 1871. Upon testifying on the 27th day of December, 1870, Ben Holladay was asked to make a statement as to what property he had acquired since the 12th day of September, 1868, and in making a statement

as to what property he had acquired since that date no mention or reference was made to the lands above described and which are the subject of this controversy. On April 3, 1871, thereafter, in answer to a question as to what property the company, Ben Holladay and Company, owned on the date the dissolution suit was commenced, Ben Holladay failed to mention the lands herein.

The issues framed in said dissolution suit were, however, finally determined by the Supreme Court of the State of Oregon on the 7th day of July, 1879, and in the findings no mention or reference was made to the said lands, notwithstanding the fact that the relative rights of the parties thereto were determined after the examination of the records from the court below, which included the depositions above referred to.

Prior to the determination of the dissolution suit above referred to, which was commenced on November 5, 1869, another suit was instituted by John Nightingale and S. G. Elliott as complainants against the Oregon Central Railroad Company and the Oregon and California Railroad Company as defendants. This suit was commenced some time prior to the 5th day of October, 1873, and an amended bill of complaint was filed on August 11, 1873. This suit was for the purpose of recovering whatever interest the said S. G. Elliott and John Nightingale had in the Oregon Central Railroad Company which, as they claimed, had been absorbed and swallowed up by the Oregon and California

Railroad Company by and through the fraudulent schemes and machinations of Ben Holladay in a general sale made to the Oregon and California Railroad Company of all of the property of every kind and nature of the Oregon Central Railroad Company; that the sale and absorption of the Oregon Central Railroad Company was in effect the work of Ben Holladay, who dominated and controlled the affairs of both companies.

The interest of S. G. Elliott in the Oregon Central Railroad Company and which he was endeavoring to recover in the suit entitled, John Nightingale, et al., vs. Oregon Central Railroad Company et al., was an interest acquired by virtue of his interest in and connection with the A. J. Cook and Company, which was later taken over and succeeded by the firm of Ben Holladay and Company, the latter firm, prior to the institution of said suit, towit, on the 28th day of March, 1870, having made a general sale of all its assets of every kind unto the Oregon Central Railroad Company.

The Oregon Central Railroad Company and the Oregon and California Railroad Company answered to the bill of complaint and in said answer all transactions leading up to the purchase of the Oregon Central Railroad Company were set out and rehearsed and special consideration was given to the said agreement of March 28, 1870, the same being made a part of the defendants' answer to said bill of complaint, cross bill by attaching a copy thereto. The defendants by setting up this

agreement in their answer, were endeavoring to show that any rights the complainant S. G. Elliott had in the firm of Ben Holladay and Company were determined in so far as the Oregon Central Railroad Company was concerned, by this agreement of March 28, 1870, and that there was a good and sufficient consideration paid unto S. G. Elliott by the firm of Ben Holladay and Company for whatever interest S. G. Elliott may have had in the property so conveyed to the Oregon Central Railroad Company at that time. This amended answer was verified by the Oregon and California Railroad Company by Ben Holladay as president and by A. G. Cunningham as secretary.

In the same suit and soon after the filing of the original bill of complaint, towit, on the 22nd day of June, 1871, Ben Holladay signed an affidavit before Ralph Wilcox, Clerk of the court wherein said suit was pending, setting forth that he was a director and one of the principal stockholders in the Oregon and California Railroad Company, and in addition thereto made numerous denials and allegations to and concerning the matters and things set forth in complainant's bill of complaint, and on page 4 of said affidavit refers to the proceedings of March 28, 1870, showing that he had knowledge of and relied upon the agreement of March 28, 1870, which had been executed by himself and other members of the firm of Ben Holladay and Company.

Following the incidents just referred to, on or

about the 29th day of February, 1876, an agreement was entered into between Ben Holladay and the holders of ten million dollars worth of the bonds of the Oregon and California Railroad Company, said agreement being signed by Ben Holladay by H. Hampton, his attorney in fact, and Henry Villard, attorney in fact for the bondholders, which agreement will be referred to hereinafter as the Frankfort Committee agreement. By the terms of this agreement Ben Holladay was to sell and transfer unto the Frankfort Committee nineteen million dollars of the capital stock of the Oregon and California Railroad Company, being all of the legally issued stock of the said company, excepting only one million dollars held by M. S. Latham and others.

In clause nine of this agreement there was a provision in substance to the effect that Ben Holladay would, in the event that it should ever appear that there was any property which equitably belonged to the Oregon Central Railroad Company or to its successor, the Oregon and California Railroad Company, standing in the name of Ben Holladay, or held in the name or possession of any other person or persons, or corporations, in trust, that the said Ben Holladay for himself, his heirs and legal representatives, would, on demand, convey to the Oregon and California Railroad Company any such property, or take such legal proceedings as may be necessary in conjunction with said company or companies to perfect the title thereto

in the said Oregon and California Railroad Company.

Prior to the execution of this agreement, towit, on the 27th day of September, 1875, Ben Holladay made a will, making special disposition of all his estate, but made no reference to the lands in controversy here. In this will he made a number of specific bequests and after so doing gave all the rest and residue of his estate unto Maria de Grubissich, the defendant herein. The defendant in this suit claims to hold the legal title to the lands in dispute under and by virtue of this residuary clause in said last will and testament of Ben Holladay, deceased.

That after the making of said will and prior to the death of Ben Holladay and the probate of his will, there was born to Ben Holladay and Esther Holladay, his wife, one daughter, named Linda Holladay, now Linda H. Dorcy, and one son, named Benjamin C. Holladay, and as to the said Linda H. Dorcy and Benjamin C. Holladay there was an intestacy.

The will of Ben Holladay, deceased, was duly admitted to probate on the 11th day of October, 1887, by the County Court of Multnomah County, and the said estate was administered and forever settled and the administrator, Joseph Holladay, brother of Ben Holladay, deceased, was discharged September 10, 1900.

The probate proceedings show that the estate of

Ben Holladay was appraised and that in the list of property furnished by the administrator and the appraisers of said estate, the lands above described and which are in controversy here were not listed nor mentioned.

That at the time this estate was administered and settled, the defendant Maria de Grubissich was about sixteen years of age, and Linda Holladay, now Linda H. Dorcy, years of age, and Benjamin C. Holladay twelve (12) years of age.

The defendant Maria de Grubissich is now a resident of Tunis, Africa, and has so resided during the past fifty years and is a subject of the Emperor of Austria, and has not resided in the State of Oregon, or the United States, since the death of Ben Holladay in July, 1887.

There is no evidence in the record to the effect that defendant, or any one representing her, has made any claim to the above described lands since the settling of the estate of Ben Holladay, or any other person connected with or having to do with the estate of Ben Holladay since his death and the probate of his estate, or prior to his death, to these lands, nor is there any evidence of any acts of ownership by any of said heirs or representatives of said Ben Holladay, deceased.

The complainant herein has been in peaceable possession of these lands since March 28, 1870, and has paid the taxes thereon since 1873, excepting

the year 1877, when for some reason these lands were not assessed.

The complainant was not aware that any one else claimed the legal title to these lands until it was served with summons and copy of complaint in the ejectment action commenced by the defendant above named, on or about the 11th day of March, 1911. These lands have been claimed by the Oregon and California Railroad Company since the 28th day of March, 1870, and since said date has continually asserted its ownership to said lands by various acts and deeds which will be hereinafter more particularly referred to.

STATEMENT OF ISSUES.

Complainant claims to have introduced sufficient evidence herein to establish affirmatively the following propositions:

I.

That on the 28th day of March, 1870, an agreement was executed by Ben Holladay, C. Temple Emmet and by Ben Holladay and Company, a copartnership, and on the same date delivered unto the Oregon Central Railroad Company, wherein it was agreed to convey unto the Oregon Central Railroad Company the lands in dispute in this suit.

II.

That the original of this agreement is not now in existence, but that it has been lost or destroyed

and that in all probability was destroyed in the fire and great conflagration which occurred in San Francisco on the 18th day of April, 1906.

III.

That a true copy of the original of this agreement appears in the minute book of the Oregon Central Railroad Company on pages 175 and 176, which was introduced in evidence herein and marked "Complainant's Exhibit 7".

IV.

That another copy of this same agreement is a matter of record in a certain suit entitled John Nightingale and S. G. Elliott, complainants, vs. Oregon Central Railroad Company and Oregon and California Railroad Company, defendants, which was commenced in the Circuit Court of the United States for the Ninth Circuit, District of Oregon, some time prior to October, 1873.

V.

That at the time the said agreement of March 28, 1870, was executed by Ben Holladay and others, it was the intention of the parties thereto to agree to convey unto the Oregon Central Railroad Company the lands hereinbefore described and which are the subject of this controversy, and was a bona fide attempt so to do.

VI.

That the complainant has been in continuous,

open and notorious, exclusive and adverse possession of the said lands under claim of title adversely to the defendant since the 29th day of March, 1870, and has paid the taxes thereon since the year 1873 to 1910, inclusive, except the year 1877, when no assessment was levied on these lands.

VII.

That the defendant and her predecessors in interest and all others claiming title by virtue of the residuary clause of the last will and testament of Ben Holladay, deceased, have disclaimed all interest in and to the lands in dispute and have long since been and are now barred by the statute of limitations and by laches from successfully asserting any claim of title to the said lands, and that it will be *presumed* that the instrument of March 28, 1870, or some other conveyance to these lands, was duly executed by the firm of Ben Holladay & Co. and Ben Holladay.

VIII.

That the two parcels of land hereinbefore described and which are the subject of this controversy, were purchased from James Grindley and Gardner Elliott by Ben Holladay and Company, a co-partnership, for the purpose of securing the timber thereon and for locations for saw mills to manufacture said timber into ties, etc., in building a railroad for the Oregon Central Railroad Company, and that said lands were purchased primarily for the use and benefit of said Company.

IX.

That by a written agreement Ben Holladay, C. Temple Emmet and the firm of Ben Holladay and Company, a co-partnership on or about the 28th day of March, 1870, agreed to convey unto the Oregon Central Railroad Company for a good and valuable consideration, all of their right, title and interest in and to the following described real property, towit:

The East Half of the Southeast Quarter, and lots five and six of section twenty-nine, and the North Half of the Northeast Quarter of section thirty-two, township one south of range two east of the Willamette Meridian, and that on said date the Oregon Central Railroad Company duly conveyed said premises to the Oregon & California Railroad Company, and that ever since said date the last named company has been in the actual open, notorious and adverse possession thereof, under color and claim of title thereby deraigned.

STATEMENT OF POINTS AND AUTHORITIES

I.

Where there appears upon the pages of a minute book of a corporation a copy of an agreement, such minute book may be introduced in evidence to prove the existence, execution, delivery and contents of the original, where from the evidence it appears:

(a) That the original of the copy set out in such minute book has been lost or destroyed and is not now in existence, and this is sufficiently proven when it appears:

1st. That a reasonably diligent search has been made to find the original of said alleged copy, and that such search has failed to produce the original.

Wigmore on Evidence, Sec. 1193 to 1198, Vol. 2,

Elliott on Evidence, Sec. 1451 et seq., Vol. 2,

Jones on Evidence, Sec. 216, Pocket Edition,

Elliott on Evidence, Sec. 1459, Vol. 2.

2nd. A sufficient search has been shown where it appears:

(a) That the proper persons in whose custody such agreement would most likely be found, have searched or caused a search to be made through their files, vaults, etc., wherein agreements and papers of the same character are usually kept and such search has been without result.

Minor v. Tillotson, 7 Peters (U. S.) 99

Winchester v. Aiken, 31 Fed. 393

Smith v. Cox, 9 Or. 327

Williams v. Northern Pac. Ry. Co., 20 Or. 425

Greenleaf on Evidence, Sec. 558, Vol. 1

Elliott on Evidence, Sec. 1459-61, Vol. 2

Wigmore on Evidence, Sec. 1194, Vol. 2, 2nd paragraph.

(b) That the minute book wherein the alleged copy is set out has been properly introduced, and this has been done where it appears from the evidence.

1st. That it was produced from the proper custody of one whose duty it is to take care of and look after such books and records and that such person came into possession of such book from his predecessor, who was a proper person to have the custody of such book.

Elliott on Evidence, Sec. 1330 et seq., Vol. 2

Thompson on Corporations, Sec. 1852, Vol. 2

Morgan v. Hutt, 113 S. W. 958

Milner v. Phelps, 115 S. W. 891

2nd. That the person or persons who made such entries and records are not now living, but whose handwriting and signatures appearing in such books have been recognized by persons who knew them and were familiar with their handwriting and testified that they were the persons whose duty it was to make such entries and that they knew that the minute book constituted the records of a certain corporation which had been relied and acted upon as such for a number of years.

Owings v. Speed, 5 Wheaton 520

Union Gold Mining Co. v. N. B., 2 Colo., 565

Chenango Bridge Co. v. Lewis, 63 Barb. (N. Y.) 111

Union Bank v. Knapp, 20 Mass., 96

Thompson on Corporations, Sec. 1852, Vol. 2 (2nd Ed.)

(c) That the minute book of a corporation which contains entries and records therein more than thirty years old, is admissible in evidence to prove the existence, execution, delivery and contents of certain writings which were copied therein, where it appears:

1st. That it contains entries of various transactions and preliminary negotiations leading up to the execution of an agreement of which a copy is therein set out, which from their very nature would furnish strong argument in favor of their own verity.

Attorney General v. Boultbee, 2 Ves. Jr., 380

Goodman v. Jack, 62 Mo., 416

2nd. That entries and memoranda made therein were made in the regular and due course of business by one who is not now living and whose duty it was to keep such record and who had no personal interest in misstating the facts therein recorded, and that no evidence has been introduced to show that they were made for fraudulent purposes or in anticipation of the present litigation.

Lassono v. Boston & Lowell R. R. Co., 60 N. H., 315

Wheeler v. Walker, 45 N. H., 358-59; see cases cited p. 359

Welch v. Barrett, 15 Mass., 385

Elliott on Evidence, Sec. 481, Vol. 1

3rd. That from the very necessities of the case it is imperative that such minute book be admitted, it being the best evidence that is pos-

sible of being produced in order that the Court may safely determine whether or not the complainant is to prevail in this suit.

Welch v. Barrett, 15 Mass., 383-4
Thomas v. Thomas, 1 La., 166-68
Dodge et al. v. Gallatin, 130 N. Y. 133
Wigmore on Evidence, Sec. 1192, Vol. 2
Elliott on Evidence, Sec. 481, Vol. 1
Ency. of U. S. Sup. St. Repts., Vol. 3, p. 2145.

II.

It is not necessary to the competency of a pleading as an admission against a party that it be one filed in an action between the same parties. A pleading filed in any action is competent against a party if he signed it, or otherwise acquiesced in the statements contained in it, if such statements are material and otherwise competent as evidence in the cause on trial, not by way of estoppel, but as evidence open to rebuttal that he admitted such facts.

Wharton on Evidence, Sec. 838, Vol. 1
Greenleaf on Evidence, Sec. 195, Vol. 1
Ency. of Evidence, p. 425, Vol. 1, and cases cited.

(a) Pleadings verified by a party, or drawn under his special instructions and which raise an issue of fact, are admissible in evidence against him in other cases, whether between the same parties or not.

Jones Electric Co. v. Jonathan Clark & Sons, 108 Fed. 170

Royalls, Administrator v. McKenzie et al, 81 Ala. 364

Pope v. Allis, 115 U. S. 368-69

Elliott on Evidence, Sec. 237, Vol. 1

Greenleaf on Evidence, Secs. 171, 180, Vol. 1.

Fickett v. Swift, 41 Me. 65, 68

(b) The admissions of a party to a fact wherever or however made, are evidence against him even though they may be found in an answer as a bill in chancery, when pertinent to the questions involved in the case on trial.

Robbins v. Butler, 24 Ill. 388

Hayman v. Wheeler, 29 Fed. 347

(c) Admissions set forth in pleadings, even though in another action, are admissible against a party in another and different action with other parties, if it be shown that such admissions were made with his knowledge or sanction, or by his direction.

Cook v. Barr, 44 N. Y. 156

(d) Admissions may be made in words, or they may be implied from assumed character, acts or conduct, and in some instances from silent acquiescence.

Elliott on Evidence, Vol. 1, Sec. 221

Perry v. Johnson et al, 59 Ala. 648

Block et al. v. Hicks, 27 Ga. 522.

(e) But it should appear that the language or conduct in question was known and understood by the party claimed to have acquiesced therein, and that he was naturally called upon to take some action or make some response thereto.

Martin v. Capitol Ins. Co., 85 Ia. 643-4

McElmurray v. Turner, 86 Ga. 215

Elliott on Evidence, Sec. 221, Vol. 1

(f) If the interest of a party is in jeopardy by statement made in his presence, an inference may be drawn that he had knowledge and acquiesced in such statement more or less strong in proportion to the inducement to make the denial.

Vale v. Strong, 10 Va. 457

(g) Whenever declarations have been made in the presence of a party in a suit to which he was not a party, under such circumstances as would call for a denial, such declarations may be submitted to the jury.

Vale v. Strong, 10 Va. 457

(h) Any statements made in the presence of such party as an auditor, is admissible unless he can show that he lacked either the opportunity or motive to deny its correctness.

Wigmore on Evidence, Vol. 2, bottom of page 1255

Elliott on Evidence, Sec. 231, pages 333, Vol. 1

Bathke v. Krassin, 82 Minn. 226

(i) Under some circumstances the party's mere seeing or perusal of the third party's document without responsive protest or denial or explanation, may indicate an admission of its correctness, each case standing virtually by itself.

Wigmore on Evidence, Vol. 2, page 1261, Sec. 1073, paragraph 1

Raub v. Nisbett, 118 Mich. 248

(j) Admissions made by an ancestor affecting the legal title to real property, are admissible in evidence against an heir of such an-

cestor in a suit brought by the grantor of such ancestor to quiet title to such property.

Elliott on Evidence, Sec. 267, Vol. 2
Chadwick v. Founnier, 69 N. Y. 404
Matton v. Young, 45 N. Y. 696
Boyworth v. St. Louis Assn. 174 U. S. 182, 189

(k) When a part of the pleadings of another action are competent and material as evidence in another and different action, the whole of such record, if it has any bearing upon the case before the court, may be offered in evidence.

Henderson, administrator de bonis non v. Gargill, 31 Miss. 367
Wheeler v. Styles, 28 Tex. 240

III.

A writing agreeing to convey all of the real property of a grantor within the State of Oregon, especially in Multnomah and Clackamas Counties, is not void as being too indefinite and uncertain in its description of the property to be conveyed to be enforced, such instrument will obligate the party to convey all of the real property of the grantor within the said counties and state.

Tiffany on Law of Real Property, Vol. 2, Sec. 387, p. 882
Pettigrew v. Dobbilaar, 63 Cal. 396
First Natl. Bank of Attleboro v. Hughes, 10 Mo. App. 7
Brown v. Warren, 16 Nev. 228
Marr v. Hobson, 22 Me. 321
Harney v. Edens, 69 Tex. 420

Clifton Heights Land Co. v. Randall, 82 Ia. 89

Jones' Law of Real Property in Conveyancing, Vol. 1, Sec. 347

Frey v. Clifford, 34 Cal. 335

Blair v. Burns, 8 Cal, 397

Wilson v. Boyce, 92 U. S. 325

(a) An unacknowledged deed, though not entitled to record, passes title and is a good conveyance, except as to a bona fide purchaser for value, and is good between the parties.

Manadas v. Mann, 14 Ore. 450

Security Trust Co. v. Lowenberg, 38 Ore. 163

Williams v. First Natl. Bank, 48 Ore. 575

Moore v. Thomas, 1 Ore. 201

Eadie v. Chambers, 172 Fed. 75

(b) A contract containing the essential terms of sale although not complete, is sufficient within the statute of frauds and parole evidence is admissible to explain ambiguities or supply omissions.

Salmon Falls Mnf. Co. v. Goddard, 14 Howard 446

Stubblefield v. Imbler, 33 Ore. 450

Saveland v. Western Wisconsin R. R. Co., 118 Wis. 272

IV.

A verbal agreement of sale is sufficient to transfer the legal title to real property as against the vendor and those claiming under him, where the evidence shows that the purchase price has been paid and that the vendee went into possession, paid

the taxes and asserted title and ownership as against the vendor for more than twenty years.

Howell v. Ellesberry, 79 Ga. 481
Whiting v. Hay, 181 U. S. 91
Townsend v. Vanderwercker, 160 U. S. 183
Ward v. Cochran, 71 Fed. 131 —
(see facts page 128)
Dickerson v. Colgrove, 100 U. S. 578
Schnabel v. Schulz, 137 Fed. 395
Rosenblat v. Perkins, 18 Ore. 159

V.

It may be conceded that in law a deed to a co-partnership in the firm name alone would not pass title to the land, but such is not the rule in equity where it appears from the circumstances that the property was purchased for partnership purposes and that it was used by such partnership in connection with the business conducted by such co-partnership.

Dunlap et al. v. Green, 65 Fed. 242
M. J. Frost et al. v. Wolf, 77 Tex. 455-6
Foster v. Sargent, 72 N. H. 171
Johnson v. Hogan, 158 Mich. 648-9
Riddle v. Whitehill, 135 U. S. 631-34
Whitney v. Dewey, 158 Fed. 385-391
Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583-7
People v. Sholen, 244 Ill. 502
Holmes v. Self, 79 Ky. 297

(a) In equity an agreement to convey real estate signed by two members of a co-partnership in such a manner as to indicate that it was an agreement signed for and on behalf

of such co-partnership, is binding upon each member thereof who acquiesces in such agreement, and it passes title to such real property to the vendee upon the performance by him of his part of the agreement.

Dunlap et al. v. Green, 60 Fed. 242
Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944
Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583
M. J. Frost et al. v. Wolfe, 77 Tex. 455
Riddle v. Whitehill, 135 U. S. 634

(b) As to those who sign such agreement, upon the complete performance thereof by the vendee they are in equity divested of all their right, title and interest in such real property intended to be conveyed by such agreement.

Robbinson Bank v. Miller, 153 Ill. 244
Dunlap et al. v. Green, 60 Fed. 242
Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944
Schlichter Jute Cordage Co. v. Mulqueen, 142 Fed. 583
M. J. Frost et al. v. Wolfe, 77 Tex. 455
Brunson v. Morgan, 76 Ala. 594
Riddle v. Whitehill, 135 U. S. 634

VI.

In a suit to quiet title to real property commenced by the grantee, claiming under an agreement to convey by a co-partnership, which agreement was executed forty years prior to the commencement of such suit, the heirs claiming under a residuary clause in a will of one of the members of such co-partnership who signed such agreement,

are barred by laches and cannot prevail where it appears.

(a) That the grantee has performed his part of such agreement by paying the consideration therein named and has gone into possession and so remained for more than thirty years and has paid the taxes thereon and has expended further sums in reliance of such agreement; and

(b) That such heirs have not by any act or deed made it known that they ever claimed to have any interest in such real property since the death of such ancestor, notwithstanding the fact that such ancestor's estate has been administered and fully settled for more than twenty years, and that such heirs knew at the time of his death he was the owner of considerable real property within the State and in the county wherein such estate was administered, and that he had been engaged in building railroads and had acquired real property for such purposes.

Goddon v. Kimmel, 99 U. S. 201-210-225
Abrahams v. Ordway, 158 U. S. 416-422-429
Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685
Norris v. Haggin, 136 U. S. 386
Lane Co. v. Locke, 150 U. S. 193
Thorne Wire Hedge Co. v. Washburn Mfg. Co., 159 U. S. 423
Underwood v. Dugan, 139 U. S. 380
Fuller et al. v. Montague, 59 Fed. 212—affirming 53 Fed. 204
Kemp v. Nickerson, 66 Fed. 682
Loomis v. Rosenthal, 34 Ore. 585

Swift v. Smith et al., 79 Fed. 709
Curtis et al. v. Lakin, 94 Fed. 251

(c) The question of laches does not depend upon the fact that a certain definite time has elapsed since a cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier.

Townsend v. Vanderwerker, 160 U. S. 172
Old Colony Trust Co. v. Dubuque Traction Co., 89 Fed. 794
Goddon v. Kimmel, 99 U. S. 201

(d) Laches cannot be imputed to one in the peaceable possession of the land under an equitable title for delay in resorting to a court of equity for protection against the legal title, since possession is notice of his equitable rights and he need not assert them, only when he finds occasion to do so.

Ruckman v. Corey, 129 U. S. 387
Massenbury et al. v. Dennison, 71 Fed. 619

(e) Laches which will bar a suit in equity, depends on the particular circumstances of each case, and where the complainant in an action does not appear to have worked injury to any one, and it is not shown that there was any occasion for more promptly asserting his rights, the defense will not prevail.

Hanchett v. Blair, 100 Fed. 817

(f) Ignorance which is the effect of negligence, is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent

to knowledge of all the facts which a reasonably diligent inquiry would disclose. Whatever is notice enough to invite attention and put a party on his guard and call for inquiry, is notice of everything to which such inquiry might have led and when a person has such knowledge to lead him to investigate a fact, he shall be deemed conversant with it.

Swift v. Smith et al., 79 Fed. 709
Wood v. Carpenter, 101 U. S. 135
Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436
Felix v. Patrick, 145 U. S. 317

VII.

Where a corporation goes into actual possession of real property, claiming title thereto under an imperfectly written and imperfectly executed agreement, and remains in possession thereof openly, continuously, notoriously and adversely to another who claims to hold the superior legal title, for a period of more than ten years, title thereto is perfected in such corporation as against the person or persons claiming same under the record title.

(a) What constitutes actual possession is governed largely by the surrounding circumstances, and the evidence necessary to establish actual adverse possession varies in each particular case, much depending upon the situation of the property and the use to which it may be applied.

Bowen v. Guild. 130 Mass. 123.

(b) It is not the particular use made of the land, or whether it has been built upon

and used as a residence, or used, cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations which show the visible, open and exclusive possession and use of the land.

Mooney v. Coolidge, 30 Ark. 655

(c) Although there may be actual entry, neither actual occupation, cultivation nor residence is necessary where the property is so situated as not to admit of any permanent improvement or cultivation, but where acts of ownership have been done upon the land from the nature of which indicate continuous claim of title and are continued long enough, such acts are evidence of an adverse possession for the consideration of a jury.

Dorr v. School District, 40 Ark. 237
Kerr v. Hitt, 75 Ill. 51
Coleman v. Billings, 89 Ill. 183
Washburn v. Cutter, 17 Minn. 361
Fugate v. Pierce, 49 Mo. 441
Draper v. Shute, 25 Mo. 203

(d) The payment of taxes and surveying of the premises may be considered as evidence of the claim of ownership.

Green County v. Eubank, 80 Ala. 204
Raynor v. Lee, 20 Mich. 387
Murray v. Hudson, 65 Mich. 676
McClure v. Jones, 121 Pa. St. 151
Payne v. Hutchins, 49 Vt. 314
Walter v. Gibbs, 97 Ill. 118
Little v. Downing, 37 N. H. 355

(e) Adverse possession of unproductive land is shown by the recording of deed under which the occupant claims, payment of taxes,

cutting of all the valuable timber, going upon the lands at intervals, claiming absolute ownership, employment of agents in the neighborhood to look after it, and the building of a brush fence around the portion cleared, without proof of actual occupancy.

Stevens v. Taft, 17 Gray 33
Groft v. Weekland, 34 Pa. St. 304
Washburn on Railroad Property, Vol. 3, 134
Ellicut v. Pearl, 10 Peters (U. S.) 412
Ewing v. Burnett, 11 Peters (U. S.) 41

VIII.

Where a private corporation has an existence in fact and is acting under color of law, its right to exist as a legal entity cannot be attacked collaterally by private parties, unless it is shown that such corporation has been declared to be an illegally organized corporate body in a direct proceeding instituted by the state for that very purpose.

Cook on Corporations, Sec. 637, p. 1804
Central Ry. Co., v. Union Ry. Co., 144 Ala. 639
Independent Order v. United Order, 94 Wis. 230
Soule Falls Bridge Co. v. Fisk, 23 N. H. 171
Leavenwood v. McGee, 50 Or. 233
Masters v. Umpqua Valley Oil Co., 90 Pac. 151

The right of a corporation to acquire and hold real estate in excess of what it is authorized to hold by its charter, cannot be questioned by private parties, and the only remedy being a pro-

ceeding against it by the state to forfeit its charter.

Thompson on Corporations, Vol. 3, 2nd Ed., Sec. 2397
Fayette Land Co. v. Louisville & N. R. R. Co., 93 Va. 274
Bone v. Delaware & C. Canal Co., 5 Atl. 751
Colorado Etc. Co., v. Am. Etc. Co., 97 Fed. 843
Brown v. Schleier, 118 Fed. 981
Pullman's P. C. Co., v. Central Trans. Co. 171 U. S. 138
Alexandria &c. R. R. Co., v. Johnson, 58 Kan. 175
Peru Etc. Co. v. Harker, 144 Fed. 673
Brigham v. Peter Etc. Hospital, 126 Fed. 796
Rogers v. Nashville R. Co., 91 Fed. 299

IX.

In a proceeding to quiet title to certain lands, it will be presumed that a conveyance was duly executed and delivered to a corporation in possession thereof, where the evidence adduced shows

First: That such corporation has been in the actual, open, exclusive, notorious and adverse possession of said lands for more than forty years; and

Second: That it has paid the taxes thereon during each and every year of the said period of forty years; and

Third: That certain persons who claim the record title to said lands under and by virtue of a will executed Sept. 27, 1875, and probated Oct. 11th, 1887, as residuary devisees, have never made any claim to the lands, nor paid the taxes thereon since said will was executed or probated; and

Fourth: That neither the testator nor any other person in privity with him, have during said period of forty years, in any manner by act or deed, indicated that they claimed any interest in said lands, or any part thereof.

Fletcher v. Fuller, 120 U. S. 534
Record v. Wheaton, 7 Wheaton (U. S.) 59
Holtzman v. Douglas, 168 U. S. 284
United States v. Chavez, 175 U. S. 520

ARGUMENT

I.

THE LANDS HEREINBEFORE DESCRIBED WERE NECESSARY AND INDISPENSABLE TO THE FIRM OF BEN HOLLADAY & COMPANY IN BUILDING A RAILROAD FOR THE OREGON CENTRAL RAILROAD COMPANY, AND WERE PURCHASED FOR THIS PURPOSE.

It is claimed by complainant that the real property hereinbefore described was agreed to be conveyed unto the Oregon Central Railroad Company by the firm of Ben Holladay & Company, a co-partnership, and by Ben Holladay and C. Temple

Emmet on the 28th day of March, 1870. Upon that date a writing was signed by Ben Holladay and C. Temple Emmet for and on behalf of the co-partnership and for themselves individually, in which they agreed to convey unto the Oregon Central Railroad Company in addition to various other items of personal property, the lands which are now subject to controversy before the court. Owing to the great lapse of time since the execution of this agreement, complainant has been unable to produce any witnesses who had primary knowledge of its existence, execution and delivery and has been compelled to present evidence showing the situation of the parties and their relation to each other with reference to these lands prior to, at the time of and subsequent to the execution of the said agreement of March 28, 1870. From these circumstances, when considered with the secondary evidence in the record as to its existence, execution and delivery, it will no doubt be clear to the court that it was signed and delivered on the day and date as alleged in paragraph VIII of complainant's complaint, and that it was an agreement of the parties signing it to convey said lands unto the Oregon Central Railroad Company.

A brief examination of the evidence submitted concerning the events occuring prior to the 28th day of March, 1870, discloses that these lands were purchased by Ben Holladay & Company within a few months after that firm had assumed the contract which had theretofore been entered into by and between A. J. Cook & Company and the

Oregon Central Railroad Company. By the terms of this agreement between A. J. Cook & Company and the Oregon Central Railroad Commpany, A. J. Cook & Company were to construct a railroad for the Oregon Central Railroad Company from Portland, Oregon, south to the California state line.

The evidence will further show that these lands were purchased for the purpose of securing the timber thereon and for mill sites for the erection of saw mills to manufacture such timber into ties and bridge timbers which were necessary in the building of said railroad.

The evidence in the record will further show that saw mills were located upon these lands and that the timber thereon was used for railroad ties and other timbers necessary in the construction of the first twenty miles of this railroad.

The object of complainant in presenting these facts to the court is to show that the purchase of these lands by the firm of Ben Holladay & Company was one of the expenditures necessary to the firm of Ben Holladay & Company in carrying out their contract with the Oregon Central, and that these lands would not have been purchased by the firm of Ben Holladay & Company at the time they were so purchased for any other purpose than for the uses to which they were put, and to identify these lands as within the contract of March 28, 1870. Further, that it was no doubt one of the expenditures for which the

firm of Ben Holladay & Company expected the Oregon Central Railroad Company to reimburse them, and this being so, it was the intention of Ben Holladay & Company in signing the agreement of March 28, 1870, to include these lands with the other property therein enumerated as a part of the consideration passing to the Oregon Central Railroad Company for the payment unto the said firm of Ben Holladay & Company by the Oregon Central Railroad Company of the sum of $800,000.

If complainant succeeds in establishing it to be a fact, that these lands were purchased for no other purpose, than for the timber thereon, and for the location of sawmills, to manufacture railroad ties, bridge timbers, etc., for the Oregon Central Railroad Company, the lands described in the agreement of March 28th, 1870, will be identified, and it will have succeeded in overthrowing the only substantial basis upon which defendant rests her case. The other points relied upon by the defendant are purely technical and do not go to the merits. If the court should agree with the defendant that the purchase of these lands had no connection with the building of the Oregon Central road, and that they were not used to any extent whatsoever for such purpose, then it would indeed be a serious question as to whether or not the agreement of March 28th, 1870, was executed by Ben Holladay & Company with the intention of agreeing to convey the lands in dispute to the Oregon Central Railroad Company, for the reason

that the general description in the contract would fail to identify these lands. Such a conclusion, however, is impossible in view of the facts hereinafter set out.

That there did exist a co-partnership by the name of A. J. Cook & Company and that they had entered into a contract with the Oregon Central Railroad Company to build its railroad from Portland, Oregon, south to the California state line, see complainant's Exhibits 23 and 24, pages 1155 to 1176, and 1183 to 1200 of the transcript of record, Vol. III.

That this contract was assumed by the firm of Ben Holladay & Company, see page 1176 of the transcript of record, Vol. III.

It is not disputed that the firm of Ben Holladay & Company was formed and that Ben Holladay was a member of such co-partnership, and that the primary object of such co-partnership was to take up and complete the work of building the railroad for the Oregon Central Railroad Company which had been commenced by A. J. Cook & Company, nor is there any dispute that the firm of Ben Holladay & Company built the first 20 miles of this railroad. See page 398 of the transcript of record, Vol. I.

Soon after assuming the A. J. Cook & Company contract, the firm of Ben Holladay & Company secured leases to cut and remove all of the timber on the lands hereinbefore described and to erect

saw mills thereon. These leases were dated November 18, 1868—see Exhibits 39 and 40 on pages 1353, 1354, 1355, 1356 and 1357 of transcript of record, Vol. III. One was secured from James Grindley for the following described land: East Half of the Southeast Quarter and lots numbered five and six of section twenty-nine, township one south, range two east of the Willamette Meridian; and the other from Gardner Elliott for the following described land: North Half of the Northeast Quarter of section thirty-two, township one south, range two east of the Willamette Meridian. These lands will be referred to hereinafter as Grindley and Elliott tracts.

From Exhibit 43 (see pages 1363 to 1376 inclusive, transcript of record, Vol. III) it appears that James Grindley received a patent from the United States Government on the 5th day of August, 1869. Prior thereto, towit, on May 4, 1869, he deeded the same land to the firm of Ben Holladay & Company.

Gardner Elliott secured patent from the United States Government on the second day of May, 1870, and on the 5th day of October, 1869, prior thereto, Gardner Elliott and wife deeded this tract to the firm of Ben Holladay & Company. See Exhibit 43, which is an abstract of title to these lands and which contains a complete history up to the time they were conveyed unto the firm of Ben Holladay & Company. Certified copies of the deeds and leases just referred to are represented

by Exhibits 39, 40, 41 and 42. (See pages 1353 to 1376 inclusive, transcript of record, Vol. III).

The theory of the defendant seems to be that at the time the firm of Ben Holladay & Company acquired the Grindley and Elliott tracts, the timber thereon had been removed and that such fact is a circumstance from which it is to be concluded that the lands were not purchased by Ben Holladay & Company for the purpose of aiding it in carrying out its contract with the Oregon Central Railroad Company, and are therefore not within the general description of the contract of March 28th, 1870. That this conclusion is incorrect is evidenced by an analysis of the evidence pertaining to the following facts:

FIRST: Referring to Exhibit 43, it appears that the leases to cut and remove the timber were made to Ben Holladay & Company before patents had been issued by the United States. While it does not appear from the abstract (Exhibit 43), (see pages 1363 to 1376 inclusive, transcript of Record, Vol. III) just on what date the claims were approved and allowed by the local land office, it is fair to assume that in the usual course of things, they were approved and allowed during the interval, beginning on the date the leases were made between Grindley and Elliott and Ben Holladay & Company, and the date on which patents were issued. From this it may be inferred that the only reason the firm of Ben Holladay & Company did not purchase these lands and take deeds

thereto on the date that the leases were made, was that it was not known then whether or not the Grindley and Elliott claims would be allowed.

It is hardly probable that Ben Holladay, or Ben Holladay & Company would have purchased these lands after the timber had all been removed, especially in view of the existence of the leases which gave them sufficient right to cut and remove the timber and to erect their saw mills. It was no doubt agreed between the firm of Ben Holladay & Company, James Grindley and Gardner Elliott at the time these leases were made, that as soon as the claims of Grindley and Elliott were allowed and final proof made deeds would be executed and that the balance of the purchase price agreed upon at the time the leases were executed would be paid by the firm of Ben Holladay & Company. If this were not so and the defendant's contention that at the time the deeds were executed that it was just a spontaneous thought on the part of Ben Holladay that it would be a good speculation to purchase these lands, why should he have created any doubt in the matter by having the deeds read to Ben Holladay & Company instead of to himself.

SECOND: When the firm of Ben Holladay & Company assumed the contract of A. J. Cook & Company—see pages 340 and 343 of the transcript of record, Vol. I, also Exhibit 24 (which is a complaint in the suit of Ben Holladay & Company vs. S. G. Elliott, to which is attached a copy of Ben Holladay & Company's co-partnership agreement,

wherein it is stated that Ben Holladay & Company are to purchase the contract of A. J. Cook & Company), (see pages 1183 to 1200 inclusive, transcript of record, Vol. III) they had thereby undertaken to carry it out in full by building the road to the California state line. Owing to certain difficulties which have been referred to in the statement of facts and which are not material to the point to be made at this time, the firm of Ben Holladay & Company, at their request, were released from this undertaking and a new agreement was entered into on the 7th day of September, 1869. By the terms of this agreement the firm of Ben Holladay & Company were to construct only the first 20 miles of railroad. And it is further provided in this agreement that the Oregon Central Railroad Company should transfer unto the firm of Ben Holladay & Company all of its stock issue, with the exception of fifteen shares, also all of the bonds of the Company. These transfers were to be made for the purpose of securing the firm of Ben Holladay & Company for any sums which they had already expended in constructing said railroad, and for any sum which they would have to expend thereafter in building the first 20 miles of road. See pages 379 to 380, inclusive, of transcript of record, Vol. I.

The Elliott tract was not purchased until after this agreement of September 7, 1869 was entered into. From Exhibit 43, page 1365 of transcript of record, Vol. III, also Exhibit 41, pages 1358,

1359, transcript of record, Vol. III (which is a certified copy of the deed from Elliott to the firm of Ben Holladay & Company), it is shown that this deed was executed on the 5th day of October, 1869. This tends to show that when purchasing the Elliott tract at least, the firm of Ben Holladay & Company intended that the Oregon Central should reimburse them for such outlay, and that this land was a part of the real property used or acquired for the construction of the road. Further, it was an inopportune time for Ben Holladay to have caused a deed to be executed to this tract in the name of Ben Holladay & Company if it was his intention to have acquired same for his own use and benefit, for the reason that it would be a circumstance which would furnish argument to the effect that it was purchased for railroad construction purposes, and that the Oregon Central was to repay the firm of Ben Holladay & Company for same upon final settlement of their affairs, and that under the agreement of March 28th, 1870, it would be identified as one of the tracts used or acquired for railroad purposes.

It is not reasonable to assume that a man of Ben Holladay's business ability would have repeated the error of a few months before, by causing a deed to property he was purchasing individually to be made in such a manner as to indicate that others were to share in it.

As will hereafter appear, all of the timber was not removed, but, on the other hand, a considerable

amount must have been taken off by Ben Holladay & Company after these deeds from Grindley and Elliott had been executed, and that the timber was used in constructing the first 20 miles of the Oregon Central railroad. If, as the defendant contends, the firm of Ben Holladay & Company did not own the lands at the time the timber was removed, then the timber could have been removed only by virtue of the existence of the leases above referred to, and this being true, if it was the intention of Ben Holladay to purchase these lands for his own use and benefit, these leases were at the time encumbrances against the land. An examination of the deeds fails to show that they were so mentioned or referred to as encumbrances, and if they had been considered as encumbrances at this time Grindley and Elliott would no doubt have insisted that these encumbrances be excepted when executing the deeds above referred to. When the leases were made, it is probable that final proof had not been made as to either tract, and sales could not legally have been made, and the leases were to be merely temporary instruments, permitting the lessees to assume ownership until final proof and until deeds could be made.

THIRD: From Exhibit 3 (which are the pay rolls of mill No. 3) it is clear that all of the timber was not removed from the Grindley and Elliott tracts on the 4th day of May, 1869, as this mill was still in operation during the month of June thereafter. Furthermore, there appears in Ex-

hibit 23, (page 1176 of transcript of record, Vol. III, paragraph 9), (which is a certified copy of the findings of the Supreme Court of the State of Oregon on an appeal from Marion County, in the suit of Ben Holladay, et al. vs. S. G. Elliott et al), that the greater portion of the first 20 miles of road was constructed subsequent to the purchase of the Elliott tract, which was on the 4th day of October, 1869. The construction was completed December 24th, 1869, and the final work was rushed so as to finish within the time required by the Act of Congress.

In paragraph IX of the findings of the court page 1176 of transcript of record, Vol. III), it is stated that during the month of May only nine and July only ten men were employed on the whole line of the road from Portland to Salem; that the appellant was absent in the Atlantic States during the preceding winter and returned too late to commence operations on the road during the months when work could have been prosecuted with the greatest benefit to the firm and the best season of the year for profitable labor in railroad building was suffered to go by, and the appellant was discharged by the firm of Ben Holladay & Company from their employment as general superintendent, on the 4th day of October, 1869, a largely increased force of laborers were placed on the road, far higher wages were paid for workmen, and in this way the section of twenty miles was completed on the 24th day of December, 1869.

These findings must have been based upon evidence in the record in support thereof and are conclusive that a considerable portion of the timber must have been removed from the Grindley and Elliott tracts subsequent to the 4th day of October, 1869.

FOURTH: The testimony of a number of witnesses who were employed by the firm of Ben Holladay & Company during the periods just above referred to, discloses that saw mills were operated by Ben Holladay & Company and that they were used to manufacture the timber on these lands into ties and bridge timbers, and that such ties and bridge timbers were used in building the Oregon Central railroad.

First, the testimony of Mr. A. M. Elam, which appears on pages 87 to 98, inclusive, of the transcript, Vol. III. Mr. Elam testified that he was an employee of Ben Holladay & Company during the winter of 1869, and was engaged in hauling ties from the saw mill operated by Ben Holladay & Company and which was located on what is known as the Gardner Elliott 80 acre tract (see page 89 of transcript of record, Vol. III), to the Oregon Central railroad, which was then being constructed (see page 90 of transcript of record, Vol. III).

On pages 89 and 90 of the transcript of record, Vol. III, Mr. Elam states that the reason he remembers that it was in the fall or winter that he hauled ties from saw mills No. 2 and 3, was that it rained considerable and was during the rainy

season. He further stated that in hauling ties he traveled over what was referred to as the diagonal road, and which he located as being on one of the tracts in dispute (see page 91 of the transcript, Vol. III); that at the time he was employed in hauling ties he noticed that there was considerable timber on these lands and that it had not all been removed (see pages 92 and 93 of transcript, Vol. III). On cross examination he was very positive in stating that these mills which were located on these lands were operated by the Ben Holladay crowd.

The testimony of Samuel E. Wishard shows that he was an employee of the Oregon Central Railroad Company in 1868 or 9; that he was paid by Ben Holladay and that he was foreman and as such built the carriage for what is known as mill No. 1 (see page 108 of transcript, Vol. III); also gave location of mill No. 2, stating that it was built for manufacturing railroad ties and timber (see page 109 of transcript, Vol. III); that he never was at mill No. 3, but knew that such a mill was in existence (see page 110 of transcript, Vol. III) and that the Company had another mill designated as mill No. 4 near the Milwaukie Station (see page 114 of transcript, Vol. III), and that all of the mills were operated by the firm of Ben Holladay & Company and were all used to manufacture railroad ties, etc., for the Oregon Central Railroad (see pages 113 and 114 of transcript, Vol. III).

On page 111 of transcript, Vol. III, Mr. Wishard also locates the diagonal road by pointing it out from a blue print in evidence, marked Complainant's Exhibit No. 2. Witness further states that he made a recent investigation of the lands at the request of Mr. Fenton and found evidence of an old saw mill site (see pages 110 to 113 of transcript, Vol. III), and on the witness stand located these old mill sites on blue prints in evidence (see pages 112 and 113 of transcript). He further stated that he knew James Grindley and Gardner Elliott and that they were employed by the firm of Ben Holladay & Company (see pages 115 to 121 of transcript, Vol. III).

On page 113, witness further stated that in making the investigations at the request of Mr. Fenton, he noticed many indications showing that these lands had been logged off a good many years ago; also that these lands had been burned over; that the remains of the old saw mill site showed signs of having been through a fire.

On pages 116 and 117, this witness was shown Exhibit D, which is a part of the deposition of S. G. Elliott, taken May 29, 1871, in the suit of Holladay et al. vs. S. G. Elliott et al, which appeared to be pay rolls showing certain sums of money having been paid to James Grindley and Gardner Elliott. He was asked whether or not the names of Grindley and Elliott as appeared on Exhibit D were the same persons who took up what are known as cash entries No. 641 and 693.

Witness stated that he did not know that they were, but, on the other hand stated that he did not know of any other persons in the vicinity at this time bearing the names of James Grindley and Gardner Elliott other than those whose names appeared on the pay roll referred to in this deposition as Exhibit D, and that he never knew of any other persons bearing the name of James Grindley or Gardner Elliott taking up any land in this vicinity.

Edward S. Elliott, called by the complainant, stated that he was a son of Gardner Elliott, who was the grantor named in the deed to Ben Holladay & Company as evidenced by Exhibit 42 on page 1361 of transcript, Vol. III, (see pages 174 and 175 of transcript, Vol. I); that he recalls the firm of Ben Holladay & Company, and that such firm operated saw mills designated as mills No. 1, 2 and 3, and that railroad ties, bridge timbers, etc., were manufactured by these mills for the building of the Oregon Central railroad (see pages 177 and 178 of transcript, Vol. I); that Gardner Elliott, his father, built mill No. 3 for Ben Holladay & Company (see page 178 of transcript, Vol. I). Also stated that the Grindley tract, which was immediately north of the Gardner Elliott tract, was purchased by Ben Holladay & Company about the time mill No. 3 was built, and that the timber on this tract also was manufactured by the firm of Ben Holladay & Company into railroad ties and bridge timbers (see page 179 of transcript, Vol. I).

This witness was shown the original pay rolls of saw mill No. 3, and among the list of employees appeared the names of Gardner Elliott and James Grindley, whose signatures appeared upon this pay roll as having received certain sums of money as wages. Witness identified the signature of Gardner Elliott, but was not familiar with the handwriting of James Grindley (see pages 192 to 193 of transcript, Vol. I).

A. N. Wills, another witness for complainant, testified that he had lived in the vicinity of these lands in question when he was a boy and passed the saw mills on his way to school (see pages 202 and 211 of transcript, Vol. I), and remembers that mills No. 2 and No. 3 were located about the center of what is known as the Gardner Elliott tract, and that these mills were operated by Ben Holladay & Company (see pages 201 and 202 of transcript, Vol. I) to manufacture railroad ties, bridge timbers, etc., for the construction of the Oregon Central railroad, and that his uncle was head sawyer (see page 204 of transcript, Vol. I).

This witness also located the diagonal road as being upon the Elliott tract, and leads from a certain point, pointing it out on the blue print, down towards the Clackamas Station, and that this road had been there as long as he could remember (see pages 202 and 203 of transcript, Vol. I).

The witness was also shown Exhibit 2, which purports to show an old saw mill location about

the center of the Elliott eighty, east and west and little south of the center, and stated that as near as he could recollect, this old mill must have been about a quarter of a mile from road running straight to Clackamas Station toward Oregon City, and about a quarter of a mile west of that (see page 204 of transcript, Vol. I).

Also, see testimony of J. T. Apperson, which was in substance that he had been upon the lands in 1869 and had seen saw mills thereon and that these saw mills and property were generally known to be the property of Holladay & Company and that a great many men were employed in and about these mills and that they were used for the purpose of manufacturing railroad ties, bridge timbers, etc., for the construction of the Oregon Central Railroad (see pages 673 to 679 of transcript, Vol. II).

From the testimony of these witnesses just above briefly outlined, it is very clear that these lands were purchased by Ben Holladay & Company and that the timber thereon was manufactured and used by Ben Holladay & Company in the construction of the first 20 miles of railroad for the Oregon Central.

From the testimony of these witnesses when considered in connection with the other facts referred to above, it is hardly possible to conclude that the Grindley and Elliott tracts were purchased by Ben Holladay individually and for his own use and benefit, but on the other hand, must have

been purchased by Ben Holladay & Company for use in and about the building of the first 20 miles of railroad for the Oregon Central Railroad Company. This being so, it would not be logical to conclude that upon the completion of the road and after the timber had been removed, that in making a final settlement with the Oregon Central Railroad Company, Ben Holladay & Company would not take into account the sums of money they had expended for these lands. This evidence identifies these lands as within the contract of March 28th, 1870.

SUMMARY OF THE FOREGOING PRELIMINARY MATTERS.

The evidence just referred to above shows:

FIRST: That the firm of A. J. Cook & Company, a co-partnership, was formed and that its business was principally to build and construct a railroad for the Oregon Central Railroad Company.

SECOND: That this contract was later assumed by another co-partnership styled Ben Holladay & Company, of which Ben Holladay was a member and principal owner.

THIRD: That the Grindley and Elliott tracts, the lands which are the subject of this dispute, were purchased by the firm of Ben Holladay & Company for the timber thereon and for the

location of saw mills to manufacture such timber into ties and other timbers for railroad construction purposes.

FOURTH: That the timber thereon was used by Ben Holladay & Company in building the first 20 miles of railroad for the Oregon Central from Portland, Oregon, for a distance of about twenty miles south.

FIFTH: That the deed to these tracts, evidenced by Exhibits 41 and 42, read from James Grindley and Gardner Elliott to Ben Holladay & Company.

The Court's attention has been directed to these facts not for the purpose of showing that these lands were purchased by Ben Holladay & Company as a co-partnership, but to show that there was only one reason for their having been purchased at the time they were so purchased and that this reason was that the timber thereon was necessary and indispensable to the firm of Ben Holladay & Company in building the first 20 miles of road for the Oregon Central. But keeping in mind the events just referred to, in considering what follows the completion of the first twenty miles of road, which will be shown by the record, it becomes very clear that these lands were purchased primarily for the use and benefit of Ben Holladay & Company, in the construction of the Oregon Central Railroad Company and that they were to be conveyed by Ben Holladay & Company to, and ultimately paid for by the Oregon Central Railroad

Company. The fact that these lands were so used and purchased identifies them as within the description contained in the agreement of March 28, 1870.

DEFENDANT'S EXCEPTIONS

Defendant's bill of exceptions embodies certain objections to the introduction of complainant's exhibits which will be more appropriately considered at the times they are discussed in connection with the point in hand. The general objection that no foundation has been laid for the introduction of secondary evidence to show the existence, execution and delivery of the agreement of March 28, 1870, will be satisfied when it is shown hereinafter that this agreement has been lost or destroyed and that sufficient search has been made to find it. Furthermore, Ben Holladay & Company and Ben Holladay are estopped by the corporate records of the Oregon Central Railroad Company, to deny that the copy set out therein is not a true copy of the original.

Defendant excepts to the admission of Exhibits 21 *and* 24 *as being incompetent, irrevelant and immaterial.*

This exception is not well taken, as it appears that Exhibits 21 and 24, (These exhibits appear upon pages 1155 to 1172, and 1183 to 1214 of transcript, Vol. III) are part of the pleadings in the case of Ben Holladay et al, vs. S. G. Elliott et al., wherein Ben Holladay was a party. Exhibit

21 is referred to and identified in said suit as Exhibit C, and it is admitted in said suit that said Exhibit C, is a copy of the contract entered into by and between A. J. Cook & Company and the Oregon Central Railroad Company. It further appears upon the face of this contract that it was cancelled by mutual agreement of Ben Holladay & Company and the Oregon Central, after the firm of Ben Holladay & Company had assumed such contract and had finished the first 20 miles of railroad. The existence of this agreement is one of the issues raised by the pleadings (see paragraph VI of the complaint, on page 4 of transcript, Vol. I, and paragraph V of defendant's answer, on page 27 of transcript, Vol. I).

> "Evidence may be offered of any fact or facts made an issue in a case at bar by the terms of the pleadings, under the rules of pleading."
>
> Wigmore on Evidence, Sec. 3, Vol. I.

Ben Holladay having admitted that such an agreement was executed and delivered, in his amended complaint in said dissolution suit, and the making of said agreement a part of the pleadings, amounts to an admission against interest, and is competent evidence to establish the allegation of paragraph VI of the complaint.

> Jones Electric Co. v. Jonathan Clark & Sons, 108 Fed. 170
>
> Elliott on Evidence, Sec. 257, Vol. I

This exhibit is further objected to as not having been properly authenticated or identified.

This exhibit was introduced in evidence through J. C. Moreland, who was one of the witnesses called for the complainant. Judge Moreland stated that he was Clerk of the Supreme Court of the State of Oregon, and that he was appointed referee in the suit entitled Ben Holladay et al. vs. S. G. Elliott et al., and in said suit recalls seeing this agreement; also recognized the handwriting of Ben Holladay and A. J. Cook appearing on said agreement (see pages 867 and 868 of the transcript, Vol. II).

Exhibit 21 (appearing upon pages 1152-1172 transcript, Vol. III) is also properly before the Court in the case at bar for the reason that it is a certified copy of the original of said agreement, under the hand and seal of J. C. Moreland, Clerk of the Supreme Court of the State of Oregon.

That the above sufficiently identifies Exhibit 21, see

> Jones on Evidence, Sec. 623, and cases cited.
> Also see Section 752 Lord's Oregon Laws.

Exhibit 23 (appearing upon pages 1173 to 1183 transcript, Vol. III) being a part of the pleadings in the said suit entitled Ben Holladay et al. v. S. G. Elliott et al., wherein Exhibit 21 above referred to is an exhibit, is subject to substantially the same rules as to its being properly authenticated.

As to its competency, the Court is referred to paragraph IX of said Exhibit 23 (page 1176 of transcript, Vol. III) which is a finding that tends to disprove the contention of the defendant that all of the timber on the lands designated as the Grindley

and Elliott tracts was removed prior to the purchase by Ben Holladay & Company.

"Where the whole of a record which could have any bearing upon the case before the court is offered in evidence, it should be admitted."

Henderson Administrator de bonus non v. Micajah Cargill et al., 31 Miss. 367.

This exhibit was introduced in evidence through J. C. Moreland, one of the witnesses for complainant. (See pages 865, 866 and 868 of transcript, Vol. II).

There is another objection to the introduction of Exhibits 23 and 24, namely, that no foundation has been laid showing the existence, execution and delivery of the agreement of March 28, 1870, and that such original agreement has been lost and that a proper search has been made for same.

This objection will be satisfied when considered in connection with complainant's reply to the objections to Exhibit 7, and will be governed by the same rules.

II.

ON THE 28TH DAY OF MARCH, 1870, THE FIRM OF BEN HOLLADAY & COMPANY AND BEN HOLLADAY AND C. TEMPLE EMMET AS INDIVIDUALS, EXECUTED AN AGREEMENT, AGREEING TO CONVEY THE LANDS HEREINBEFORE REFERRED TO AS THE GRINDLEY & ELLIOTT TRACTS UNTO THE OREGON CENTRAL RAILROAD COMPANY.

To prove the above proposition involves the discussion of the points referred to under sub-division 1 of Statement of Points.

Complainant has offered in evidence the minute book of the Oregon Central Railroad Company, which is designated as Complainant's Exhibit 7. On pages 160 and 208 thereof (see pages 380 and 440 of the transcript, Vol. I), there is set out what complainant claims to be a true copy of the original of this agreement. This agreement is as follows:

> KNOW ALL MEN BY THESE PRESENTS, That we, the undersigned, Ben Holladay and Company, of Portland, Oregon, in consideration of the cancellation of this date by the "Oregon Central Railroad Company" at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned, in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua, and Rogue River Valleys to the California line, and the agreement of such company to pay the undersigned for all moneys

laid out, expended, and incurred under such contracts, to-wit:—an amount not less than eight hundred thousand dollars in U. S. Gold coin. "It being a part of this arrangement that all the property hereinafter specified should be transferred and delivered to said company, and in consideration of the full sum of One Dollar to us in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, set over, transferred, delivered and conveyed, and by these presents, we Ben Holladay & Company, do sell, assign, set over, transfer, deliver and convey unto said "Oregon Central Railroad Company," of Salem, Oregon, all saw mills and machinery connected therewith, all machinery, tools, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing, tackle and all leases and all property of every name and nature now owned by Co. in the possession of Ben Holladay & Co. all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being the mills, machinery, tools, implements, apparatus, live stock, horses, mules, cattle, carts, drays, wagons, gearing tackle, railroad ties, iron rail spikes and other railroad materials now and heretofore used by us in the construction of the "Oregon Central Railroad Company." *It being the intention of this conveyance to transfer to said "Oregon Central Railroad Company" all property real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon.*

TO HAVE AND TO HOLD the said property and every part thereof unto the said "Oregon Central Railroad Company," of Salem, Oregon, its successors and assigns absolutely and forever.

IN WITNESS WHEREOF we have hereto set our hands and seals this 28th day of March A. D. 1870.

BEN HOLLADAY,
C. TEMPLE EMMET,
By Ben Holladay, Attorney in Fact
BEN HOLLADAY & CO.,
By Ben Holladay.

Five cent U. S. R.
stamp cancelled.

Before entering upon a discussion of the rules of evidence involved, the Court will first be asked to consider the evidence submited as to whether or not such an agreement was in fact ever executed. No harm can be done by varying to this extent the general rules as to the introduction of secondary evidence of the lost document.

For the time being, we will assume that the loss and destruction of the original agreement of March 28th, 1870, has been satisfactorily proven; also that complainant's Exhibits 7, 26, 51-2-3 and 4, and 61 are properly before the Court.

The firm of Ben Holladay & Company by an agreement of September 7, 1869, as is evidenced by the minutes of the proceedings of the Oregon Central Railroad Company (see pages 379 to 388 of

transcript, Vol. I), hereinbefore referred to, came into possession of all of the stock and bonds of the Oregon Central with the exception of 15 shares, thereby placing the affairs of the Oregon Central Railroad Company under the control of Ben Holladay, who was in control of the firm of Ben Holladay & Company, he being the owner of a majority in interest of such co-partnership. (See Exhibit 24, page 1, appearing upon page 1184 of transcript, Vol. III). This agreement appears to have been entered into for the purpose of releasing the firm of Ben Holladay & Company from the obligation of completing the work undertaken by A. J. Cook & Company, and to protect the firm of Ben Holladay & Company as to the sums already expended and for any further expenditures necessary in completing the first 20 miles of road which by the new agreement of September 7, 1869, they were required to build.

After the first twenty miles of road has been finished, (see page 411 of transcript, Vol. I), in accordance with the terms of the agreement of September 7, 1869, and prior to the 28th day of March, 1870, the Oregon and California Railroad Company seems to have been organized. (It was in fact incorporated on March 17th, 1870). See pages 418-419 of transcript, Vol. I, where appears an offer of the Oregon and California Railroad Company to purchase the Oregon Central. On the same date the record shows that Ben Holladay & Company submitted to the Oregon Central a proposition wherein

Ben Holladay & Company offered to enter into an agreement to reconvey to the Oregon Central all of the stock and bonds pledged with Ben Holladay & Company by the agreement of September 7, 1869, and in addition thereto the telegraph lines so far as completed, together with uncompleted portion of the lines, including all rolling stock and other property belonging thereto or connected therewith, and all mills, machine shops, machinery, tools, implements, horses, mules, carts, live stock, and all property of every name and description now owned or *standing in the name of Ben Holladay & Company in Oregon or in their possession and intended for use in and about the construction of such railroad.* This proposition also contained a provision to the effect that the Oregon Central was to pay to the firm of Ben Holladay & Company a sum not less than $800,000.00 nor more than $1,000,000.00 for the transfer of the property above referred to. (See pages 393 to 403 transcript, Vol. I).

This proposition was accepted by the board of directors of the Oregon Central Railroad Company on the same day it was submitted (see pages 401 and 402 of transcript, Vol. I).

The record further shows that on this same date, the Oregon and California Railroad Company submitted a proposition to the Oregon Central Railroad Company to purchase the franchise and all other property of every kind or nature of the Oregon Central. This proposition was in the form of a resolution, which appears to have been passed on

the 26th day of March, 1870, by the board of directors of the Oregon and California Railroad Company, in which they empowered and authorized *Ben Holladay* to negotiate for the purchase of the Oregon Central Railroad. By the terms of this resolution, the Oregon Central Railroad Company, if it accepted this offer, was required to transfer unto the Oregon and California Railroad Company all the rolling stock and other property connected therewith, including also all the property, real, personal and mixed "now owned by such Oregon Central Railroad Company or to which it may in anywise be entitled, and including all franchises of said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or the legislature of the State of Oregon." (See page 403 of transcript, Vol. I).

This offer, according to the records of the Oregon Central, was accepted on the same date it was submitted, to-wit: on the 28th day of March, 1870. (See pages 420 to 424 of transcript, Vol. I).

On pages 414 to 424 of the transcript, Vol. I, which constitutes pages 176 to 189 of the Oregon Central minute book (Complainant's Exhibit 7) an agreement between the Oregon and California Railroad Company and the Oregon Central is set out in full, which is in effect a sale of the Oregon Central to the Oregon and California Railroad Company.

On pages 421 and 422 of transcript, Vol. I (which is page 181 of the minute book or Exhibit 7) it is provided in the said agreement between the Oregon

Central and the Oregon and California Railroad Company that the Oregon Central shall sell and convey unto Oregon and California Railroad Company, party of the second part, all the railroad and other property, both personal and real, and all other rights, franchises, privileges and property of every name, nature and character.

The agreement of March 28, 1870, which is signed by Ben Holladay, C. Temple Emmet and Ben Holladay & Company, also appears upon pages 175 and 176 of said Exhibit 7 (pages 408 and 409 of the transcript), and is apparently a part of the records of the proceedings of the sale of the Oregon Central Railroad Company to the Oregon and California Railroad Company, showing that all of these transactions just referred to were consummated on the same date. Ben Holladay was the moving and controlling factor, and knew and was bound to know all that was done. The defendant is bound by his knowledge and acts.

While it is true no direct evidence has been submitted to prove the existence, execution and delivery of the agreement of March 28, 1870, the records of the proceedings of the Oregon Central Railroad Company as disclosed by the minute book, Exhibit 7, pages 175 to 187, inclusive, and appearing upon pages 390 to 424 of transcript, Vol. I, and as just referred to above, leave no room for doubt as to whether or not such agreement was executed and delivered by Ben Holladay & Company to the Oregon Central. The agreement of the same date be-

tween the Oregon Central and Oregon and California Railroad Company is conclusively proven. See Exhibit 26 (appearing upon pages 1298 to 1332 of transcript, Vol. III), which is a certified copy of the original and which was recorded in the Records of Clackamas County on April 18, 1870, showing that this agreement was in existence and that it was executed and delivered on said date. From the existence of this agreement which, in the usual order of things, was the last of the agreements above referred to, and as set out on pages 175 to 187 of Exhibit 7 (pages 390 to 424 of transcript, Vol. I), to be signed, we have a fact from which we can safely infer that the other agreements therein referred to must have been executed and delivered. A little closer examination of these proceedings will strengthen this inference. On pages 390 and 391 of transcript, Vol. I (which is pages 159 and 160 of Exhibit 7), there appears the record of a director's meeting dated March 14, 1870, at which a resolution was passed authorizing the dissolution of the Oregon Central, showing that the events recorded on pages 176 to 187 of the minute book (see pages 390 to 424 of transcript), were no doubt anticipated.

Next appears the offer of settlement made to the Oregon Central by Ben Holladay & Company, in which it was stated that the first 20 miles of railroad was completed, and that among other things provided that Ben Holladay & Company were to surrender and deliver up to the Oregon Central "all

property of every name and nature now owned or standing in the name of Ben Holladay & Company in Oregon, or in their possession, and *intended for use in and about the construction of such railroad,*" and that such property will be transferred and conveyed to said Oregon Central Railroad Company. (See pages 393 to 397 of transcript, Vol. I).

It is clear from the provisions of clause 3 of this offer just referred to, that Ben Holladay & Company intended to execute an agreement of the same character as the one referred to above and of which a copy appears to have been set out in the records of the proceedings leading up to the purchase of the Oregon Central by the Oregon and California Railroad Company. (See pages 408 and 409 of transcript, Vol. I).

It is also clear that such an agreement must have been executed before the Oregon Central Railroad Company could have executed the agreement, a copy of which appears to have been set out on pages 178 to 187 of Exhibit 7 (see pages 414 to 424 of transcript, Vol. I), for the reason that the title to practically all of the tangible property which the Oregon Central Railroad Company had thereby undertaken to convey unto the Oregon and California Railroad Company was, prior to the execution of the said agreement of March 28, 1870, as appears on pages 175 and 176 of Exhibit 7 (pages 408 and 409 of transcript) in the name of Ben Holladay & Company.

The similarity of the phraseology used in the res-

olution or offer to purchase made by the Oregon and California Railroad Company to Oregon Central; in the offer of settlement made to the Oregon Central by Ben Holladay & Company; in the agreement to convey, executed by Ben Holladay & Company, and in the agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company, with reference to the property to be transferred, furnishes strong argument in support of the proposition that all of these transactions were the work of one man, and that that one man was Ben Holladay there can be little doubt. Nothing could be more natural than the occurrence of the events as are recorded on pages 159 to 187 of Exhibit 7 (pages 390 to 440 of transcript), and to take from these records the agreement to convey of March 28th, 1870, signed by Ben Holladay & Company, as appears on pages 408 and 409 of the transcript, Vol. I, would take away the very foundation and basis upon which all the other transactions relative to the purchase of the Oregon Central Railroad Company by the Oregon and California Railroad Company rest.

The agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company of March 29th, 1870 (Ex. 26, pages 1298 to 1332 of transcript, Vol. III), is referred to and identified by Ben Holladay in his affidavit of June 22nd, 1871 (see pages 1475 to 1507, inclusive, Vol. III of transcript).

Quoting from this affidavit (pages 1486 and 1487 of transcript):

> "The said Simon G. Elliott has at this time in his possession any certificate or certificates of stock in the Oregon Central Railroad Company for any share or number of shares it is a part of said preferred seven per cent non-assessable—interest bearing stock specified as being held by said persons in Schedule "F" of Complaint and the whole thereof is as I am advised illegal and void, and the whole thereof was on the 28th and 29th days of March, 1870, legally cancelled by the stockholders and directors of said defendant the Oregon Central Railroad Company is and by virtue of the proceedings then had *and recitals from the record of which will more fully appear in the copy of deed of transfer from the Oregon Central Railroad Company defendant to the Oregon and California Railroad Company defendant in the exhibit attached to plaintiff's complaint herein*, (referring to the suit of John Nightingale et al vs. Oregon Central Railroad Company et al) *and which copy of deed is referred to by me and made a part of this my affidavit.*"

The above extract is only one of many admissions contained in Ben Holladay's affidavit, which establishes conclusively that he was fully informed as to all of the proceedings as are recorded upon the pages of the Oregon Central Railroad Company minute book (see pages 380 to 440 of transcript, Vol. I), connected with the execution and delivery of the agreement of March 28th, 1870.

The signing of the agreement of March 28th,

1870, by Ben Holladay & Company, wherein they agreed to convey the same property which was conveyed and transferred unto the Oregon and California Railroad Company on March 29th, 1870, naturally preceded the signing of the said agreement between the Oregon Central Railroad Company and the Oregon and California Railroad Company, and that it was signed and delivered as it appears to have been, by what is recorded upon pages 390 to 440 of transcript, Vol. I, becomes more certain when such corporate records are considered in connection with the following, towit:

THE PLEADINGS IN THE CASE OF JOHN NIGHTINGALE ET AL VS. OREGON CENTRAL RAILROAD COMPANY ET AL.

In addition to the foregoing evidence referred to as to the existence, execution and delivery of the alleged lost agreement of March 28, 1870, it appears from the pleadings in the above entitled suit that this same agreement was involved and that it was made a part of the defendants' (Oregon Central and Oregon and California Railroad Companies') answer to the bill of complaint (see page 28 of Exhibit 61, pages 1583, 1584 transcript, Vol. III), wherein it is stated that copy of the said agreement is made a part of such answer and is marked Exhibit G (a certified copy of said Exhibit G, being numbered complainant's Exhibit 61-b herein, page 1615 transcript, Vol. III).

In the same suit there appears another copy of this same agreement (see complainant's Exhibit 53 (pages 1508 to 1516 transcript, Vol. III), which is *a stipulation between the attorneys of record in the above entitled suit whereby it was agreed that an Exhibit 10 which is thereto attached, is a true copy of the original of the said alleged lost agreement, and that it was compared with the original thereof by the attorneys of record in said suit and that they were satisfied that it was a true copy.*

In paragraph 8 of Exhibit 53 and page 1511 transcript, Vol. III, it is stated that Exhibit 10 is the same as Exhibit G which is made a part of defendants' answer.

If such an alleged lost agreement was never in existence but was simply a fiction as counsel for defendant would have the Court believe, it would be rather extraordinary for it to have been referred to so many times by the parties to the above entitled cause, and especially in litigation controlled by Ben Holladay, one of the parties to that agreement, and litigation directly involving the same.

On page 4 of Exhibit 52, Ben Holladay's affidavit filed in the same suit, he refers to the minutes and various other matters which transpired at the meetings which were recorded in the minute book of the Oregon Central on March 28, 1870, (see pages 1479 to 1480 of transcript, Vol. III). In this affidavit page 1487 transcript, Vol. I, he makes special reference to the agreement recorded in such minute book (pages 180 to 200, Exhibit 7 and pages 414

to 440 transcript, Vol. I), between the Oregon Central and the Oregon & California R. R. Co. This incident, coupled with the fact that there is in the record a certified copy of this agreement of March 29, 1870 between the Oregon Central and the Oregon & California R. R. Co., (see Exhibit 26, pages 1298 to 1332 transcript, Vol. III), which was duly recorded in the County Recorder's office in and for the County of Clackamas, on the 18th day of April, 1870, as set out in the formal conveyance to the Oregon and California Railroad Company, presents to the Court facts from which there can be but one conclusion as to the existence, execution and delivery of the agreement of March 28, 1870, signed by Ben Holladay & Company, namely, that it was executed and delivered on the day and date as alleged in the bill of complaint and as it is shown to have been by the minutes of the Oregon Central R. R. Co. (pages 408 and 409 of transcript, Vol. I). In making this affidavit Ben Holladay spoke as an individual, and he is bound individually by his statements.

As has been stated hereinbefore, it would be impossible to remove the alleged lost agreement from the pages of the Oregon Central minute book without materially changing the agreement between the Oregon Central and Oregon & California R. R. Co., which appears of record on the pages immediately following the agreement between Ben Holladay & Company and the Oregon Central (pages 414 to 440 of transcript, Vol. I). That this is so becomes very apparent from a mere reading of these

agreements in the order in which they are recorded on pages from 160 to 208 of Exhibits 7. (Pages 408 to 440 transcript, Vol. I).

First: A reading of the list of the properties to be conveyed and transferred unto the Oregon Central by Ben Holladay & Co., shows that they were to convey unto the Oregon Central the following (quoting from paragraph 3 of the proposition submitted to the president and directors of the Oregon Central R. R. Co., on March 28, 1870, by Ben Holladay & Co., pages 397 to 401 of transcript, Vol. I:

> "The Oregon Central railroad and telegraph lines so far as completed, together with all uncompleted portions of the same, including all rolling stock and other property belonging thereto or connected therewith, shall be surrendered up and delivered to the possession of the Oregon Central, and *all mills*, machine shops, machinery, tools, implements, horses, mules, carts, oxen, live stock and all *other property* of every name and description *now owned by or standing in the name of Ben Holladay & Company* in Oregon or in their possession and *intended for use in and about the construction of such railroad*, shall be transferred, conveyed and delivered to your company."

Is there any doubt that Ben Holladay made this proposition as the controlling spirit?

This appears upon pages 399 and 400 of the transcript, Vol. I:

Second: And in accordance with the terms of the above proposition, which was accepted by the Oregon Central on the 28th day of March, 1870, (see pages 401-402 of transcript, Vol. I). On pages 411 to 414 of transcript, Vol. I (pages 176 to 180 of Exhibit 7) is set out a bilateral agreement between Ben Holladay & Company and the Oregon Central of date March 28, 1870, wherein it is provided as follows, quoting from clause 3 of said agreement on page 412 of transcript, Vol. I.

> "The Oregon Central road and telegraph line so far as completed, together with all uncompleted portions of the same, including all rolling stock and other property belonging thereto *or connected therewith* shall be and is hereby surrendered up and delivered over to the possession, ownership and control of the Oregon Central Railroad Company, party of the first part herein."

And further, clause 6, page 413 transcript, Vol. I:

> "Ben Holladay & Company, party of the second part herein, shall, with even date of these presents and in consideration of the agreements herein contained, make, execute and deliver to the Oregon Central Railroad Company, party of the first part, a conveyance and transfer of *all the mills*, machinery, ties and other railroad material, horses, mules, oxen, tools, implements, carts, drays, wagons, *now owned by Ben Holladay and Company in Oregon and heretofore and now used in and about the construction of said railroad*, together with all other property *owned by or belonging to Ben Holladay & Company in Oregon.*"

Third: On pages 408 and 409 of the record (pages 175 to 176 of Exhibit 7) is set out a copy of the agreement which, by the provisions of clause 3 and 6 just above referred to, was to be executed and which is an agreement to convey unto the Oregon Central all of the property enumerated in clause 6 of the said bi-lateral agreement referred to in the paragraph just above, which reads, quoting from a part of said agreement:

> "That Ben Holladay & Company do sell, assign, setover, deliver and convey unto the Oregon Central all saw mills and machinery connected therewith, all machinery, tolls, implements, apparatus of every name and description, all live stock, horses, mules, cattle, work oxen, carts, drays, wagons, gearing tackle and all leases and all property of every name and nature now owned by or in the possession of Ben Holladay & Company, all of such property being in the State of Oregon, principally in Multnomah and Clackamas Counties, the same being *the mills*, machinery, tools, implements, live stock, horses, mules, carts, drays, wagons, gearing tackle, railroad ties, iron rails, spikes and other railroad materials *now and heretofore used by us in the construction of the Oregon Central.* It being the intention of this conveyance to transfer to the Oregon Central Railroad Company *all property, real and personal of every name and nature now owned or possessed by the undersigned in the State of Oregon.*"

Fourth: Read in connection with what has just been stated in the preceding paragraphs, the fol-

lowing, which is an extract from the contract between Oregon Central and Oregon & California R. R. Co., which was executed immediately after the execution of the alleged lost agreement appearing on pages 175 and 6 of Exhibit 7 just above referred to: pages 421, 422 transcript Vol. I.

> "The said Oregon Central Railroad Company does hereby sell and agree to convey within one week from this date to the Oregon and California Railroad Company, party of the second part therein, the whole of the Oregon Central railroad and telegraph line and all the rolling stock of such road, *and also all property both real, personal and mixed now owned by the* Oregon Central Railroad Company of whatever name and nature, and all the rights of way, privileges, franchises and interest whatever, both legal and equitable, which the said corporation, party of the first part herein now has or owns, and especially all the lands, rights, privileges, emoluments and benefits whatever which the Oregon Central, party of the first part herein, now has or owns or to which it is or may be entitled, either legal or equitable, by virtue of the acts of Congress aforesaid, or either or any of them, or of any other act of Congress, or any act or resolution of the Legislature of the State of Oregon, etc." (see page 11 of Exhibit 26), pages 1313 and 1314 transcript, Vol. III)

No argument is necessary to show that this agreement of March 28, 1870, signed by Ben Holladay & Co. agreeing to convey unto the Oregon

Central the property just enumerated and in addition thereto *all of the real property then owned by Ben Holladay & Company* in the State of Oregon, was executed and delivered for the reason that the Oregon Central would hardly have undertaken to convey property belonging to Ben Holladay & Co., to the Oregon & California R. R. Co. This is what counsel for defendant would have the court believe, however, for he contends that no such agreement as is set out on pages 175 and 176 of Exhibit 7, pages 408 and 409 of transcript, Vol. I, ever existed. When we have before the court a certified copy of this agreement of March 29, 1870, between the Oregon Central and Oregon & California R. R. Co., (See Exhibit 26, pages 1298 to 1332 of transcript, Vol. III) there can be no ground for asserting that the minute book of the Oregon Central containing the record of both of these agreements was a fiction, or that there is no evidence that any of these agreements or records were ever made. This agreement of March 29, 1870, between the Oregon Central and the Oregon & California R. R. Co. having been conclusively proven to be a reality, destroys all argument that could be produced by defendant against the verity of the records of the proceedings as is set out on pages 150 to 208 of Exhibit 7 (see pages 393 to 440 of transcript, Vol. I.

BEN HOLLADAY IDENTIFIES THE AGREEMENTS OF MARCH 28TH, 1870, AND MARCH 29TH, 1870, AND CONNECTS THEM WITH THE MATTERS AND THINGS RECORDED UPON THE PAGES OF THE OREGON CENTRAL RAILROAD COMPANY'S MINUTE BOOK.

We are not entirely dependent upon circumstantial and secondary evidence, or upon inferences to be drawn from the existence of this (Exhibit 26), to prove the existence, execution and delivery of these agreements, and to prove that the matters and things recorded upon pages 380 to 440 of transcript, Vol. I, are correct.

Quoting from page 14 of Exhibit 52, (pages 1483 and 1484 of transcript, Vol. III) which is from Ben Holladay's affiadavit filed in the suit entitled, "John Nightengale et al. v. Oregon Central Railroad Co. et al.,"

> "at which time and place (referring to the meeting of March 28th, 1870, see preceding sentence on page 1483 of transcript, Vol. III), the contracts between the Oregon Central Railroad Company and A. J. Cook & Co. were legally cancelled by said company and the assignees of said contracts."

An examination of the minutes of the meeting of the Oregon Central Railroad Company, (See pages 393 to 440 of transcript, Vol. I) shows that a proposition was submitted to the Oregon Central Railroad Company on the 28th day of March, 1870,

by Ben Holladay & Co. (See pages 393 to 397 of transcript, Vol. I) In clause 5 of said proposition, (page 396 of transcript) it is stated that all contracts referred to in said proposition (see page 393 of transcript) shall be cancelled by both parties. On pages 401 and 402 of transcript it is shown that the said proposition was accepted, and that the President and Secretary of the Oregon Central Railroad Company were directed to cancel said contracts in the manner prescribed in said communication. On page 413 of transcript, Vol. I, in paragraph V of a bilateral agreement, it is agreed that all of the preliminary agreements referred to upon page 410 of transcript, (Page 1 of said agreement) shall be cancelled. On pages 408 and 409 of transcript, preceding the bi-latteral agreement, is set out a copy of an agreement to convey all of the property, of every kind, then belonging to the firm of Ben Holladay & Co., in which it is again recited as follows:

> "in consideration of the cancellation this date by the Oregon Central Railroad Company, at Salem, Oregon, of all certain contracts in writing heretofore existing between said company and the undersigned in relation to the construction of a railroad and telegraph line from Portland, Oregon, through the Willamette, Umpqua and Rogue River Valleys, to the California line, and the agreement of such company to pay the undersigned for all moneys laid out, expended and incurred under such contracts, to-wit, an amount not less than $800,000.00 in U. S. Gold coin."

Here are recitals in the copy of the alleged lost agreement in substantially the same language used by Ben Holladay in his affidavit, as above stated, to the effect that the said construction contracts were cancelled. As further evidence that Ben Holladay had in mind recitals from the agreement of March 28th, 1870, as above quoted, when referring to the proceedings of March 28th, 1870, note the following extracts from his affidavit, as appears upon page 1494 of transcript, Vol. III.

> "I further state that it was for these reasons that the contracts of A. J. Cook and A. J. Cook & Co. with the Oregon Central Railroad Company were cancelled and the said Oregon Central Railroad Company was dissolved, the interest on said bonds were coming due and the Oregon Central Railroad Company had no means to meet its payment. It was therefore mutually agreed that it would be for the best interest not only of the stockholders of said company, but of all concerned the contractors as well—to cancel said contracts, thereby relieving both the company and the contractors from an embarrassing position."

It would have been rather unusual for Ben Holladay to have made so many apt references to the recitals contained in this copy of agreement of March 28th, 1870, set out upon pages 408 and 409 of transcript, Vol. I, (Pages 175 and 176 of Exhibit 7), and to the matters and things appearing upon the pages immediately preceding, and immediately following the pages upon which this agreement is recorded, had he not been familiar with

the contents thereof, and had he not fully understood the purpose and effect of such agreement and proceedings. *Had he not actually participated in the making of this agreement, and in the proceedings incident to the making thereof, he could not have so aptly referred to same in his affidavit.*

III.

WERE THE GRINDLEY AND ELLIOTT TRACTS INCLUDED IN THIS AGREEMENT BETWEEN BEN HOLLADAY & COMPANY AND THE OREGON CENTRAL, OF DATE MARCH 28TH, 1870.

The language used in all of the agreements and other transactions leading up to the signing of the agreement between the Oregon Central and the Oregon and California Railroad Company as appears on pages 159 to 187 of Exhibit 7 (pages 390 to 440 of transcript) is very general in character and does not specifically describe any real property, and the question naturally arises, what evidence is there that it was the intention of the parties to include in the agreement of March 28, 1870 between Ben Holladay & Company and the Oregon Central, the Grindley and Elliott tracts?

In addition to the argument furnished by the writings themselves, there are other circumstances when considered in connection with these writings which leaves no room for doubt that they were so included.

First, let us examine the terms of these writings with a view of ascertaining therefrom some evidence that these lands were included. In clause 3 of the offer made to the Oregon Central by Ben Holladay & Company, and which was accepted by the Oregon Central (see pages 399 to 401 of transcript, Vol. I) Ben Holliday & Company agrees to transfer unto the Oregon Central all property of every name and description now owned by or standing in the name of Ben Holladay & Company in Oregon or in their possession and intended for use in and about the construction of such railroad. This statement is certainly broad enough in terms to include the Gridley and Elliott tracts.

In the offer made to the Oregon Central by the Oregon and California Railroad Company the same general terms appear again. (see page 403 of transcript, Vol. I). It is here stated that Ben Holladay, the President of the Oregon and California Railroad Company is authorized to negotiate for the purchase of, in addition to the portions of the Oregon Central railroad which has been completed and in process of construction, "all the property, real, personal and mixed now owned by such Oregon Central or to which it may in anywise be entitled, and including all franchises of the said corporation which it now owns or to which it is or may be entitled by virtue of any act or resolution of Congress or of the legislature of the State of Oregon, or in any way".

From this language it is clear that Ben Holladay,

who was the main figure in all of these transactions, knew that the firm of Ben Holladay & Company had purchased the Grindley and Elliott tracts for the use and benefit of the Oregon Central and that they were lands the Oregon Central would own (after the execution of the agreement of March 28, 1870 by Ben Holladay & Company), in addition to its right of way and the lands to be given by the United States Government in aid of the construction of such road. This explains to some extent the reason for stating in such offer that in addition to the franchises of the Oregon Central and the lands which may be acquired from the United States, that the offer included all other property, real, etc. There can be no mistake in assuming that this statement had reference to the Grindley and Elliott tracts and that they were contemplated in making such offer, is supported by what follows.

On pages 408 and 409 of the transcript, Vol. I, is set out a copy of the agreement of March 28, 1870, and which is an agreement upon which the complainant relies in part to support its claim to the property involved in this suit. What reason can be given for the use of the following terms: "It being the intention of this conveyance to transfer to the said Oregon Central Railroad Company all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon" (see page 409 of transcript, Vol. I). if it were not the purpose of this

agreement to convey unto the Oregon Central the Grindley and Elliott tracts.

That it must have been the Grindley and Elliott tracts that were intended to be conveyed in addition to the lands to be acquired in the State of Oregon and from the Federal Government, is proven beyond reasonable doubt by the words of Ben Holladay under oath in his deposition taken in the trial of the dissolution suit entitled, Ben Holladay et al. vs. S. G. Elliott et al. In answer to the following question: "State fully all of the property owned by the firm of Ben Holladay & Company at the date of the commencement of this suit", he replied: "Aside from the contracts which the firm of Ben Holladay & Company had with the Oregon Central the firm had nothing except two saw mills and a small machine shop, also some personal property". (see page 6 of Exhibit 47 see page 1392 transcript, Vol. II)

On pages 2 and 3 of Exhibit 46 (pages 1387-1388 transcript, Vol. III) (which is an extract from the deposition of Ben Holladay taken on the 27th day of December, 1870, and prior to the taking of the deposition just above referred to), in answer to the question: "Have you purchased any property in Oregon since the 12th day of September, 1868", he replied: "I have purchased about 250 or 260 acres of land in East Portland".

It is urged by counsel for the defendant that the statement of Ben Holladay that the firm of Ben Holladay & Company owned nothing except the

contract with the Oregon Central and some items of personal property in answer to the question referred to above and as appears on page 6 of Exhibit 47, is conclusive that the Grindley and Elliott tracts were not the property of the firm of Ben Holladay & Company, but of Ben Holladay individually.

This deposition, however, (Exhibit 47, page 6) see page 1392 transcript, Vol. III, was taken on the 3rd day of April, 1871, several months after the firm of Ben Holladay & Company had agreed to convey unto the Oregon Central all of its property, and no doubt at the time the question was asked Ben Holladay he answered it in view of the changed circumstances, and that his object at this time was to show that the firm of Ben Holladay & Company had no assets of any consequences to be divided upon a final decree being entered in the said dissolution suit. That this must be so, is evidenced by his prior statements in the deposition taken on December 27, 1870, wherein he stated just what property he had purchased since the 12th day of September, 1868. If he, at this time, intended to claim the Grindley and Elliott tracts he no doubt would have stated in answer to this question, towit, "what property have you acquired or purchased in the State of Oregon since the 12th day of September, 1868," that he had purchased the said Grindley and Elliott tracts in addition to the other property named in answering this question.

This deposition was taken a few months after

the firm of Ben Holladay & Company had signed the agreement of March 28, 1870, by which it is claimed by the complainant, the firm of Ben Holladay & Company agreed to convey the Grindley and Elliott tracts to the Oregon Central.

If the Grindley and Elliott tracts were acquired as is evidenced by Exhibits 40 and 42 (pages 1355 to 1362 transcript, Vol. III) on the 4th day of May, 1869, and October 5th, 1869, respectively, or subsequent to the 12th day of September, 1868—directing these circumstances to the point in hand—where did the title to the Grindley and Elliott tracts stand at the time Ben Holladay & Company signed the agreement of March 28, 1870? We have apparently conflicting evidence from the mouth of the only person who knew better than any one the real facts. We do have, however, the deeds themselves from Grindley, (Exhibit 40) and from Elliott (Exhibit 42), conveying these lands unto Ben Holladay & Company, to support complainant's contention that when Ben Holladay stated in answer to interrogatories 1953 and 55, (Exhibit 46, pages 2 and 3) (pages 1387-1388 transcript, Vol. III) that he had not purchased any lands except about 260 acres of land in East Portland since September 12, 1868, that he knew then that the Grindley and Elliott tracts were not purchased by himself but that they were purchased by the firm of Ben Holladay & Company for the use of the Oregon Central and that they were a part of the property to be conveyed to the Oregon Central by the said agreement of March 28, 1870.

If, as is contended by counsel for the defendant, Ben Holladay & Company did not on the 28th day of March, 1870, own the Grindley and Elliott tracts, what other real property could have been referred to in this agreement?

If Ben Holladay stated the truth when he said in answer to interrogatory 22, as appears in Exhibit 47, page 6, (page 1392 transcript, Vol. III) that the firm of Ben Holladay & Company did not own any real property on the date the dissolution suit was commenced (November 5, 1869), which was prior to the execution of the agreement of March 28, 1870, what other real property did Ben Holladay & Company have in mind when they used the following terms: "It being the intention of this conveyance to transfer to the Oregon Central Railroad Company all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon"? (See page 409 of transcript, Vol. I). They did not acquire any lands from the Oregon Central on September 7, 1869, when taking over certain property of the Oregon Central as security for the building of the railroad. All that was transferred to Ben Holladay & Company by this agreement was the stock and bonds of the said Oregon Central. Any real property that Ben Holladay & Company could have had in mind must necessarily have been such as was acquired by them in connection with the building of the road, and that it was the Grindley and Elliott tracts must be very clear from what has been stated above.

According to the theory of the defendant, the title to these lands could not have vested in either Ben Holladay or Ben Holladay & Company at the time deeds were executed by James Grindley and Gardner Elliott, for the reason that Ben Holladay states that Ben Holladay & Company did not own it (see Exhibit 47, page 6, Interrogatory 22 and Answer thereto, page 1392 transcript, Vol. III), and that he himself did not own it (see Interrogatories 1953 and 1955 and answers thereto, Exhibit 46, pages 1387 and 1388 transcript, Vol. III). Such a conclusion was hardly possible in view of the evidence in the record, especially Exhibits 41 and 42, (pages 1355 to 1362 transcript, Vol. III), which show that the lands in dispute in the case before the court were conveyed unto Ben Holladay & Company.

The foregoing facts would be sufficient in themselves to identify these lands with the contract of March 28, 1870, even if there were no other circumstances to aid the court in reaching such a conclusion. These facts also tend strongly to prove the execution and admitted existence of the contract of March 28, 1870. They clearly estop Ben Holladay and his successors in interest, or his heirs or devisees, to deny such contract.

From the testimony of Samuel Wishard, as appears on pages 110 and 111 of transcript, Vol. I, it appears that he made an investigation of the lands immediately prior to giving testimony in this suit, at the request of Mr. Fenton, and from this

investigation was able to locate the lands and the saw mills which were erected thereon by Ben Holladay & Company from blue prints which were offered in evidence as Complainant's Exhibit 2. Here we have primary evidence of one who had knowledge of the location of these lands, to the effect that they are the Grindley and Elliott tracts and the same lands which the complainant claims the firm of Ben Halladay & Company agreed to convey unto the Oregon Central on the 28th day of March, 1870. Other circumstances which tend to show that the Grindley and Elliott tracts are the same lands referred to in the agreement of March 28, 1870, and as appears from the testimony of witnesses who had knowledge of same, is the existence of a diagonal road which appears to have been located on the Elliott tract and was used during the time the mills of Ben Holladay & Company were in operation in hauling ties therefrom to the Oregon Central railroad.

See the testimony of A. M. Elam (page 91 of transcript Vol. I), where witness was shown complainant's Exhibit 2, (which purports to be a plat of the Elliott tract), and pointed out the location of this road, and that it was a road used when hauling ties to the railroad.

A. N. Wills testified (pages 202 and 203 of transcript Vol. I) substantially to the same effect.

These circumstances in connection with the matters referred to hereinbefore when calling the Court's attention to the testimony of these wit-

nesses relative to the removal of timber, etc., from these tracts, show beyond a doubt that the Grindley and Elliott tracts were the lands which are the subject of controversy in this suit and which were intended to be conveyed by the agreement of March 28, 1870.

The dissolution suit entitled "Ben Holladay and C. Temple Emmet vs. S. G. Elliott, further evidences that these lands in dispute were included in the agreement of March 28th, 1870.

This suit was commenced on or about the 5th day of November, 1869, prior to the execution of the agreement of March 28, 1870, and was not finally determined until August 15, 1879, nearly ten years after the suit was begun, and over nine years after the contract of March 28th, 1870, was made. The purpose of this suit was to wind up the affairs of Ben Holladay & Company, co-partnership, and to have an accounting and settlement among the members of such firm. In these proceedings no mention or claim was made by anyone connected with the firm of Ben Holladay & Company that the Grindley and Elliott tracts were a part of the assets of the firm of Ben Holladay & Company. No mention or claim was made with reference to these lands, either in the pleadings or in the findings of the court. Exhibit 23 constitutes the findings of the Supreme Court of the State of Oregon, dated August 15, 1879, (see pages 1172 to 1183 of transcript, Vol. III). These findings no doubt were

based upon certain facts presented to the court, and had there been any evidence submitted in this suit tending to show that the Grindley and Elliott tracts were a part of the assets of the firm of Ben Holladay & Company, the court would have made a finding accordingly. The decree and findings constitute an adjudication that Ben Holladay & Company did not own these lands, binding on each member of the firm.

Furthermore, it is fair to presume that had it not been the intention of the firm of Ben Holladay & Company to convey these tracts to the Oregon Central by the agreement of March 28, 1870, they would have been claimed by some member of the co-partnership at some time prior to the final determination of this dissolution suit so that the court could have decreed in what proportion and in what manner they should go to the members of the firm of Ben Holladay & Company.

It is contended by the defendant that the only reason no claim was made by any members of the co-partnership of Ben Holladay & Company to these lands was that it was generally understood and known that the deeds from Grindley and Elliott were never intended to convey the title to the co-partnership but were intended to convey the title thereto to Ben Holladay individually. The deeds themselves negative any such conclusion, and without rehearsing the other circumstances connected with the purchase of these lands by the firm of Ben Holladay & Company, we submit that there is no

merit in defendant's contention. Besides the findings and decree were binding upon Ben Holladay, C. Temple Emmet, and S. G. Elliott, as *individuals* also.

Before proceeding further, complainant will now consider the exceptions submitted by defendant to the introduction of Exhibits 21, 23, 24, 46, 7 and 8.

These exhibits are part of the pleadings in the suit entitled, Ben Holladay, et al, v. S. G. Elliott et al, for an accounting and dissolution of the co-partnership of Ben Holladay & Company. The first objection of the defendant is that these exhibits are incompetent, irrelevant and immaterial.

Complainant contends that the absence of any reference to the Grindley and Elliott tracts in this dissolution suit, or the failure of any member of the firm of Ben Holladay & Company to make any claim to these lands in such proceeding, is a circumstance which, when considered in connection with other evidence in the record and to which the Court's attention has just been called, tends to prove that it was the intention of Ben Holladay & Company when executing the agreement of March 28, 1870, to include within its terms an agreement to convey to the Oregon Central the Grindley and Elliott tracts.

> "Evidence is relevant which tends to raise the presumption of the existence or non-existence of the fact in issue, as by proving facts other than the fact in issue, which by experience have been found to be so closely associated

with the fact at issue as to render its existence or non-existence more or less probable."

U. S. v. Searcey, 26 Fed. 435;
Wells v. Fairbank, 5 Tex. 582.

"It is not necessary, however, that it should itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant."

Elliott on Evidence, Sec. 144, and cases cited under note 6.

"It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."

Wharton on Evidence, Vol. 1, Sec. 21.

Furthermore, Exhibits 46 and 47 are depositions in the said suit, and it is only necessary to call the Court's attention to interrogatories 1953 and 55 of Exhibit 46 (pages 1387, 1388 transcript, Vol. III) and the answers thereto, also interrogatory 22 and the answer thereof of Exhibit 47 (page 1392 transcript, Vol. III), which show that they directly bear upon one of the main issues in the suit at bar, towit, whether or not the Grindley and Elliott tracts were property of the firm of Ben Holladay & Company upon the date of the commencement of the said dissolution suit.

A further objection to these exhibits on the part of the defendant is that they are pleadings in another and different suit between other and different parties and that they involve other and different subject matter and issues.

"And the general doctrine is that the declarations of a party to the record or of *one identified in interest with him*, are as against such party admissible in evidence. *The law in regard to such source of evidence looks chiefly to the real parties in interest*, and gives to their admissions the same weight *as though they were parties to the record.*"

Greenleaf on Evidence, Secs. 171, 180, Vol. I, 5th Ed.

Fickett v. Swift, 41 Me. 65, 68.

The foregoing general rule is one usually applied where an action or suit is prosecuted in the name of another.

An examination of the exhibits numbered 21, 23, 24, 46, 47 and 48, as appear upon pages 1155 to 1214 inclusive, and upon pages 1385 to 1406 inclusive, respectively, shows that Ben Holladay was not only a party to the record, but was the principal party in interest.

"The affidavits and depositions of a party are of course competent to show his admissions, although used in another suit, and from their solemn character are entitled to great weight."

Jones on Evidence, Pocket Ed., Sec. 274, note 72

"Admissions set forth in pleadings, even though in another action, are admissible against a party in another and different action with other parties, if it be shown that such admissions were made with his knowledge or sanction or by his direction."

Cook v. Barr, 44 N. Y. 156

"The admissions of a party to a fact wherever or however made, are evidence against him even though they may be found in an answer as a bill in chancery, when pertinent to the questions involved in the case on trial."

Robbins v. Butler, 24 Ill. 388
Hayman v. Wheeler, 29 Fed. 347

"Pleadings verified by a party, or drawn under his special instructions and which raise an issue of fact, are admissible in evidence against him in other cases, *whether between the same parties or not.*"

Elliott on Evidence, Sec. 237, Vol. I
Pope v. Allis, 115 U. S. 368

The defendant herein being an heir of Ben Holladay is bound by admissions he may have made during his life time which would affect the legal title to the lands in dispute.

"Admissions made by an ancestor affecting the legal title to real property, are admissible in evidence against an heir of such ancestor in a suit brought by the grantor of such ancestor to quiet title to such property."

Elliott on Evidence, Sec. 267, Vol. 2
Chadwick v. Founnier, 69 N. Y. 404

Defendant also objects to these exhibits being introduced for the reason that they are not properly authenticated or identified.

All of these exhibits are certified copies of the originals, being certified by J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, under

the seal of the said court. It is not necessary to cite any authorities to the effect that these exhibits are properly authenticated. See further, the testimony of J. C. Moreland (pages 864 to 897 of transcript, Vol. II), who identified these exhibits on the witness stand on behalf of the complainant.

The objections of the defendant that there has been no foundation laid for the introduction of these exhibits is to be considered in connection with the evidence tending to show that the agreement of March 28, 1870 has been lost and that reasonable search has been made and that it could not be located. As admissions, however, they are competent even though the execution or loss of the agreement of March 28, 1870, be not proven. These admissions constitute primary evidence.

TAXES WERE PAID ON THESE LANDS BY THE OREGON & CALIFORNIA RAILROAD COMPANY WITH BEN HOLLADAY'S KNOWLEDGE AND CONSENT.

Another significant fact and one which adds considerable weight to the complainant's contention that these lands were intended to be conveyed to the Oregon Central by Ben Holladay & Company on March 28, 1870, is the fact that the record shows that Ben Holladay was the President and *principal stockholder* of the Oregon and California Railroad company from the *year 1870 until the year 1876;* that during this time, beginning with the year 1873

until 1876, the evidence shows that the taxes were paid on the Grindley and Elliott tracts by the Oregon and California Railroad Company. (See Exhibits 66 and 67), with the exception of the year 1877. He must have known that the Oregon and California Railroad Company was paying these taxes and claiming to own the lands.

It is hardly probable that Ben Holladay, being the principal stockholder and presiding officer of the Oregon and California Railroad Company, did not know that the company was paying the taxes on these lands. He was bound to know who paid these taxes, if he was himself the owner.

The court is referred to pages 490, 491 and 492 of the transcript, Vol. I, showing that Ben Holladay was one of the incorporators of the Oregon and California Railroad Company; also that he was a director and president of the company. On pages 513 and 514 the transcript, Vol. I, shows that he was the owner of $13,499,600.00 worth of stock of the total of $20,000,000.00 for which the company was capitalized. On page 569 the transcript, Vol. II, shows that he was on that date, towit, the 9th day of April, 1872, the owner of the same amount of stock and that he was still president of the company. This is further shown on pages 592 and 593 of the transcript, Vol. II.

On pages 614 and 615 appears the record of a meeting dated April 19, 1876, whereat Ben Holladay tendered his resignation as president and

director of the company, and on pages 624 and 625 transcript, Vol. II, following there is recorded a copy of an agreement whereby Ben Holladay transferred the controlling interest of the Oregon and California Railroad Company to the bond holders.

Had it not been the intention of Ben Holladay when signing the agreement of March 28, 1870, to have conveyed the Grindley and Elliott tracts unto the Oregon Central, he certainly would not have allowed the Oregon and California Railroad Company to pay the taxes on these lands for the years above named. And furthermore, he would no doubt have been sufficiently interested had he still claimed the title to these lands, to have looked into the fact as to whether or not the taxes were being paid, and in this way could have discovered that they were being paid by the Oregon and California Railroad Company if he did not know it by reason of his connection with the said Company.

The above facts being matters referred to in complainant's Exhibit 14, (as appears on pages 484 to 537 transcript, Vol. I; 528-667, Vol. II) which is the minute book of the Oregon and California Railroad Company, it will be proper at this time to consider certain exceptions of defendant to the introduction of this minute book in evidence.

Defendant contends that this minute book of the Oregon and California Railroad Co. is incompetent, irrelevant and immaterial and is not the best evidence of any deed or other agreement upon which the complainant relies as

conveying the title to the Grindley and Elliott tracts unto the Oregon Central Railroad Company.

Complainant's purpose in offering certain portions of this minute book at this time is to show that Ben Holladay was a director, also president of the Oregon and California Railroad Company, and that he was the principal stockholder and as such must have been familiar with the fact that the complainant was paying the taxes on these lands. It is a fact from which an inference may be drawn that he must have known what land the Company owned and upon what lands the Company was paying taxes and whether or not they owned all of the lands upon which they were paying taxes.

> "Evidence tending to show the relation of the parties and the circumstances surrounding the transaction is relevant."
>
> Caldwell v. Adams, 51 Mich. 491.
>
> "When a fact in evidence necessarily accompanies the facts at issue it raises strong presumption of the existence of the fact sought to be proved. If such fact ordinarily accompanies the fact at issue it raises a probable presumption of the existence of the fact sought to be established, but if the fact sought to be admitted as evidence only occasionally accompanies the fact at issue, it raises only a very slight presumption, but even then it may, in connection with other relative and consistent facts and circumstances be admitted as an element in circumstantial evidence."
>
> U. S. V. Searcey, 26 Fed. 435

"As a general rule it may be said that any evidence which tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant."

Holman Ins. Co., v. Weide, 11 Wall (U. S.) 438

Elliott on Evidence, Sec. 144, Vol. 1.

The further objection to the introduction of Exhibit 14 that no foundation has been laid, is to be considered in connection with the exceptions to the introduction of Exhibit 7.

It is further claimed that Exhibit 14 has not been properly authenticated or identified.

This minute book was identified by Mr. R. Koehler, one of the witnesses called for the complainant. On pages 692 and 693 of transcript, Vol. II, this witness testifies that he knew Mr. A. C. Cunningham who was secretary of the company at the time the records appearing on pages 6 to 9 were made; that he recognized the signature of Mr. Cunningham, who is not now living; also recognized the signature of Ben Holladay, deceased, appearing upon the same page, who signed certain records therein as president of the Oregon & California Railroad Company.

Also see the testimony of L. F. Steel (pages 489 and 490 of transcript, Vol. I), who identifies Exhibit 14 as a journal of minutes No. 1 of the Oregon & California Railroad Company.

It appears from page 489 that it was admitted by the parties herein, generally that any and all books which Mr. Steel has produced here are part of the Secretary's books of the Oregon & California Railroad Company.

At another place hereinafter, it will be shown that Exhibit 14 when tested by the rules of evidence relative to the identification of records, has been sufficiently identified to be admitted.

ANOTHER INCIDENT TENDING TO SHOW THAT IT WAS THE INTENTION OF BEN HOLLADAY & COMPANY and BEN HOLLADAY PERSONALLY IN SIGNING THE AGREEMENT OF MARCH 28, 1870, TO CONVEY THE LANDS IN DISPUTE HERE TO THE OREGON CENTRAL IS, THE FAILURE OF THE HEIRS OF BEN HOLLADAY TO MAKE ANY CLAIM TO THESE LANDS AT THE TIME HIS ESTATE WAS ADMINISTERED.

From Exhibit 25, (set out on pages 1214 to 1298 transcript, Vol. III), which is a record of the probate proceedings of the last will and testament of Ben Holladay, deceased, we find,

First: That a will was made by Ben Holladay on September 7, 1875 (see pages 1219 and 1220 transcript, Vol. III), and that Ben Holladay died on the 8th day of July, 1887 (see page 1215 of transcript). On page 1227 of transcript, Vol. III, appears the oath of Joseph Holladay, the executor

of the estate of Ben Holladay, (a brother of Ben Holladay,—see page 106 of the transcript, Vol. I), that the annexed inventory contained a true statement of *all the real and personal property of Ben Holladay, deceased.*

Second: An examination of this inventory fails to disclose any record of the Grindley and Elliott tracts. Further, the probate proceedings fail to show that any claim was made by the executor of the last will of Ben Holladay to these lands.

It is fair to presume that Joseph Holladay being a brother of Ben Holladay, would have known whether or not Ben Holladay claimed any interest in these lands. This circumstance in addition to the absence of any evidence in the record on behalf of the defendant to show that any claim has been made since the settling up of the estate of Ben Holladay by any of the heirs or representatives of Ben Holladay, deceased, to these lands, negatives the contention of the defendant that these lands were a part of the estate of Ben Holladay and that they passed to the defendant herein by reason of the residuary clause contained in said will.

Defendant objects to the introduction of Exhibit 25 as being incompetent, irrelevant and immaterial and as not being the best evidence, and because no foundation has been laid to introduce same as secondary evidence of the existence of the agreement of March 28, 1870.

The complainant will at this time consider only

the competency, relevancy and materiality of Exhibit 25.

The point claimed by complainant for the introduction of Exhibit 25, which constitute the probate proceedings of the last will and testament of Ben Holladay, is that it is one of the circumstances which tends to prove one of the main issues raised by the pleadings, to-wit, that when Ben Holladay signed the agreement of March 28, 1870, it was his intention to convey the Grindley and Elliott tracts to the Oregon Central. Had it been otherwise, it is reasonable to conclude that Ben Holladay would have had some record of these lands and that they would have been claimed by his executors when settling up the estate, and that they would have appeared somewhere in the list of property included in the appraisement. It is a fact which the Court may consider not as being sufficient in itself to prove that such was the intention of Ben Holladay to convey the said lands to the Oregon Central, but in connection with other circumstances tends to establish that such was the intention of Ben Holladay when signing this agreement of March 28, 1870.

Elliott on Evidence, Secs. 21 and 22, Vol. 1.
Wharton on Evidence, Sec. 21, Vol. 1.

These are public records, required by law to be made, and they are when duly certified, competent evidence tending to prove that Ben Holladay at his death did not own these lands in dispute, that he had prior to his death disposed of the same, and

that such disposition was made by the agreement of March 28th, 1870, or some other grant. The evidence is competent, but not conclusive.

FRANKFORT COMMITTEE AGREEMENT

In the execution of the above agreement by Ben Holladay on the 29th day of February, 1876, we have another instance which goes far in establishing the fact that Ben Holladay did not claim to own the lands in dispute after the signing of the alleged lost agreement of March 28, 1870, thereby implying that they had been theretofore conveyed or intended to be conveyed to the Oregon & California Railroad Co. or its predecessor, the Oregon Central Railroad Company.

In clause 8 of this agreement, as appears upon pages 194 and 195 of Exhibit 14 (pages 1031 and 1032 of transcript) Ben Holladay agreed as follows, quoting a part of paragraph 8:

> "And said Holladay further covenants and agrees for himself and his heirs and legal representatives, that he will on demand, either convey to the Oregon & California Railroad Company, to the Oregon Central Railroad Company, to the Oregon Steamship Company and to the Portland Warehouse & Dock Company, or to any of them, or else, as the case may be, will take necessary legal proceedings in conjunction with said companies or any of them, for the purpose of completing the transfer to said companies or any of them, or any real

> estate or other property or rights which equitably belongs to the said companies or any of them (if any such rights or property there be) or which may now be held by or standing in the name of Ben Holladay or any other person or persons or corporations in trust, having been purchased for said corporations or conveyed to them for their use."

In view of what has been related hereinbefore, showing that the Oregon Central had agreed to pay unto Ben Holladay & Company approximately $800,000.00 to reimburse them for expenditures made in building its road (see pages 59 and 60 *supra*), how can it be said that the Grindley and Elliott tracts did not equitably belong to the Oregon and California Railroad Company at this time by virtue of the deed of March 29, 1870, entered into between the Oregon Central and the Oregon & California Railroad Company?

We have hereinbefore shown beyond any question that the Grindley and Elliott tracts were purchased for no other purpose than for use in the construction of the Oregon Central railroad, and in this connection it is to be remembered that these agreements between Ben Holladay & Co.. and the Oregon Central, and the agreements between the Oregon Central and the Oregon & California R. R. Co., do not describe any real property to be conveyed thereby in specific and definite terms. In both of these agreements it appears to be a matter of one man dealing with himself through corporations. We have shown that Ben Holladay was the

principal owner of Ben Holladay & Company (see Exhibit 24, page 1, page 1184 transcript, Vol. III) and that he held the controlling interest of the Oregon Central at the same time this alleged lost agreement was executed (see Exhibit 26, bottom of page 15 and top of page 16, page 1318 transcript, Vol. III), also Exhibit 52, page 3, (page 1476 transcript, Vol. III) and that he organized the Oregon & California R. R. Co., and took the initiative in acquiring for the latter company all of the properties formerly owned by the Oregon Central and Ben Holladay & Company (see pages 403 and 404 of transcript, Vol. I).

We find that at the time the Frankfort Committee agreement was entered into, that Ben Holladay was the owner and holder of a majority of the stock of the Oregon & California R. R. Co. In clause 2 of this agreement (see page 192 of Exhibit 14—page 1028 of transcript, Vol. II) he agrees to the following:

> "Second: The said Holladay in like manner sells and transfers and agrees to sell and transfer to the said parties of the second part, or to such persons as they may designate, the majority of the Oregon & California Railroad Company stock, namely, over 25,000 shares thereof, the remaining being held by M. S. Latham and others."

See also pages 84, 5 and 6 of Exhibit 14 (pages 555 and 556 of the transcript, Vol. I) showing that Ben Holladay held a majority of the stock of the Oregon & California R. R. Co.

Up to the time this agreement was entered into, there was apparently no one sufficiently interested in these matters to secure formal deeds from Ben Holladay for lands which were intended to be conveyed by the agreement of March 28, 1870 (the alleged lost agreement) to the Oregon Central, and in turn conveyed by the Oregon Central to the Oregon & California R. R. Co., on the day following.

It may be argued that if it was the purpose of this agreement to have further assured the Oregon & California R. R. Co. that Ben Holladay would execute deeds to such property as equitably belonged to it, that it would have been a simple matter to have secured deeds to these lands at this time instead of accepting this contract of assurance.

It appears that Ben Holladay at the time the Frankfort Committee agreement was entered into, was in Washington, D. C. (see page 614 of transcript, Vol. II), and that the agreement was signed by H. Hampton, his attorney in fact (see page 640 of transcript, Vol. II). It would not be unreasonable to conclude that at the time this Frankfort Committee agreement was entered into, none of the persons present were informed in detail as to what lands stood in the name of Ben Holladay & Company and which were intended to be conveyed by the agreement of March 28, 1870 (the alleged lost agreement), and for that reason did not and could not secure a deed.

It appears from the minutes of the meeting on pages 614 to 617 of transcript, Vol. II, that this

Frankfort Committee agreement which is dated February 26, 1876, was not executed by the parties until about the 18th day of April 1876. (See pages 696, 697 transcript, Vol. II.) That this is correct see the testimony of R. Koehler, who states that he was present at this meeting and remembers that this agreement was submitted at this time by Mr. Henry Villard. See page 696, 697 transcript, Vol. II, where he states, in substance that this agreement was signed on the 19th day of April, 1876 by Mr. Henry Villard, attorney in fact for the Committee, and by Ben Holladay by H. Hampton, Ben Holladay's attorney in fact. Also stated that at this time Ben Holladay was in Washington, D. C. (See page 697 transcript, Vol. II.)

Another reason why it was possible that a deed could not have been secured at this time is, on this same date Ben Holladay was retiring as officer and director of the Oregon & California R. R. Co. It appears that the Company was having trouble with Mr. Holladay, (See top of page 696 transcript, Vol. II) who was still in control of the Company at this time, and that it was the desire of other members of the Company to adjust these difficulties by buying Mr. Holladay's interest. From this there appears to be a good and sufficient reason why the Oregon & California R. R. Co. could not safely ask Mr. Holladay for a deed to these lands for the reason that their so doing could have been construed as admitting that the lands in dispute in this cause before the Court and any others that had

not been specifically described, did not belong to the said Oregon & California R. R. Co., and that they were not intended by the parties to the agreement of March 28, 1870 (the alleged lost agreement) to be so conveyed.

That Ben Holladay did at this time dispose of his interest in the Oregon & California R. R. Co., see pages 624, 625 of the transcript, Vol. II. (page 192 of Exhibit 14, paragraph 2).

This Frankfort Committee agreement and all proceedings connected therewith appear upon pages 612 to 662, inclusive, of the transcript, Vol. II.

IT HAS BEEN THE PURPOSE OF COMPLAINANT UP TO THIS POINT TO CALL THE COURT'S ATTENTION TO CERTAIN MATTERS OF EVIDENCE IN THE RECORDS WHICH, AS COMPLAINANT BELIEVES, FULLY ESTABLISHES THE FOLLOWING FACTS:

FIRST: That the agreement of March 28, 1870 (the alleged lost agreement) in which Ben Holladay & Company and Ben Holladay agreed to convey unto the Oregon Central the lands in dispute, did exist, and that it was executed and delivered on the day and date as alleged in paragraph 8 of bill of complaint.

SECOND: That notwithstanding the fact that these lands were not specifically described, it was

the intention of Ben Holladay & Company when executing this agreement to agree to convey them unto the Oregon Central, and that under the proofs these lands have been identified as covered by the words of general description. That is certain which can be made certain.

THIRD: That the lands in dispute were purchased by Ben Holladay & Company primarily, for the use and benefit of the Oregon Central and that they were used in aid of the construction of the first 20 miles of railroad for the said Oregon Central Railroad Company.

FOURTH: That the lands described in Exhibits 41 and 42 and hereinbefore referred to as the Grindley and Elliott tracts, are the same lands upon which said Ben Holladay & Company located their saw mills and the same from which they removed timber for ties and bridge timbers, and are the same lands referred to by Ben Holladay & Company when using the following terms in the agreement of March 28, 1870: "It being the intention of this conveyance to transfer to the said Oregon Central Railroad Company all property, real and personal, of every name and nature *now owned or possessed by the undersigned in the State of Oregon*".

IV.

IS COMPLAINANT'S EVIDENCE PROPERLY BEFORE THE COURT?

It is urged by counsel for the defendant that certain matters of evidence are not properly before the Court. Complainant has considered a part of these objections hereinbefore when discussing certain exhibits and does not believe it will be necessary to give them any further consideration, as it has been shown that for the purposes referred to hereinbefore they are clearly competent and relevant to the issues raised by the pleadings.

The matters of evidence which seem to have caused counsel for the defense the most trouble are Exhibit 7 (Oregon Central minute book), and Exhibit 14 (Oregon & California minute book); also Exhibits 51, 52, 53, 61-a-b & c (the letters a-b-c were added by counsel for complainant for convenience, they were all numbered the same), which are the pleadings in the suit entitled John Nightingale et al. v. Oregon Central R. R. Co. et al.

Considering first the objections to Exhibit 7: It appears that the principal objection to the introduction of this minute book is that it is self-serving evidence, as being private entries relating to the private business of the Oregon Central R. R. Co. made for its own use and benefit without the knowledge or consent of the defendant or her predecessor.

If it were not for the fact that the minutes of the Oregon Central as are recorded upon pages 160

to 208 (383 to 440 of transcript, Vol. I), are so closely connected with and related to the alleged lost agreement, and further, if it were not so clearly shown that Ben Holladay was the principal party in interest in all the various transactions leading up to his signing of the alleged lost agreement, and was a stockholder and participant in the very transaction itself, there would be some cause for giving this objection consideration. Ben Holladay was not a stranger within the meaning of the rule denying the competency of corporate records. The court, however, must examine these pages before it can decide whether or not they are to be excluded. After so doing it will be clear that Ben Holladay was present at the meetings of the stockholders and directors of the Oregon Central R. R. Co. as are recorded upon the pages above referred to, and that he was in control of and directed the whole proceedings. If this is so, why should these records be, in a court of equity, considered as self-serving evidence? That they are not will be presently shown. He had not only an individual interest in the transaction, and contracted and participated as such, but he was the acting majority stockholder.

It is to be borne in mind that the minute book (Exhibit 7) is not the only evidence offered by complainant to establish the existence, execution and delivery of the alleged lost agreement. It is only one parcel of evidence to be considered in connection with other facts and circumstances herein-

before referred to, which the Court may consider as one of the links of the chain of circumstances which tends to prove the existence, etc., of the said agreement. After so considering, it is for the Court to decide whether or not Exhibit 7 is to be excluded.

Furthermore, it seems to be the idea of the defendant that when complainant introduced Exhibit 7 it was introduced solely to show the copy of the alleged lost agreement. If this were true it would have been a simple matter to have introduced pages 175 and 176 of said minute book separately. This book, however, was introduced to show other circumstances connected with the execution of the alleged lost agreement which tended to prove that such an agreement as is set out in paragraph 8 of the bill of complaint (See pages 7 and 8, 9 transcript, Vol. I.) (and alleged therein to be a copy of an original bearing same day and date) did in fact exist, and that it was duly executed and delivered and that it is all that complainant claims it to be. If this copy of the alleged lost agreement was set out upon the pages of the Oregon Central minute book separate and distinct from any matters that were related to or connected with the execution of such an instrument, it would perhaps be incompetent for the Court to consider such records as evidence to any extent whatever. It would evidence no corporate action in such case. We are, however, presented with no such circumstance. On the other hand, the events recorded

upon the pages immediately preceding and immediately following the pages upon which this alleged copy of the alleged lost agreement is set out (pages 408 and 409 of transcript, Vol. I, pages 175 and 6 of Exhibit 7) and which have been discussed hereinbefore (see pages — to — *supra*), clearly and logically show that such an agreement was executed and delivered, and that in the absence of any other evidence in the record, the Court would be justified in so finding. The minutes are prima facie evidence of the facts set out therein.

There is a general rule of law to the effect, and which seems to be supported by a great many authorities, that the private records of a corporation can not be introduced to prove matters and things therein recorded which are adverse to the interests and claims of third persons who are *strangers to such* records. These authorities seem to hold that in such a situation stockholders, directors and officers of a corporation stand upon the same footing.

See page 930, Thompson on Corporations, Vol. 2, last paragraph Sec. 1860—citations 131

Counsel for the defense has cited a great many authorities to the same effect.

These authorities base their reason for so holding upon the proposition that to admit such records would throw down the bars against fraud and to admit the private records of corporations in evi-

dence to prove claims of its own against third parties, would permit the clerks, officers, etc., of such corporations to prepare records suitable for proving any claims that might appear to be plausible.

See Sec. 1858, Vol. 2, Thompson on Corporations.

This author in commenting upon the admission of such records states:

> "This doctrine has been severely criticised as both unjust and dangerous, unjust in that it would prove or tend to prove a relation never assumed and a contract never entered into, and dangerous because a secretary or other officer of a corporation, by entering a man's name as stockholder on the corporate books might without his knowledge or consent make him a stockholder, and where countervailing proof has become impossible by reason of death or other circumstances, such unauthorized act might charge him or his estate with a burden he never assumed."

But there is no presumption of fraud, and where corporate records appear regular, and are produced from the proper custodian, and the party to be affected by their introduction was present and made the record, they are clearly competent, upon two grounds:

First, corporate records required to be kept; *Second*, because they constitute admissions made by the party participating or knowing their contents.

However, they do not hold that where a case is presented that is free from any suggestions of fraud or other suspicious circumstances tending to show that the matters and things therein recorded are fabrications, that such records are not admissible, especially where such records contain a history of certain events which lead up to the culmination of the business transaction or other matter in dispute, in such a logical manner as to admit of no doubt that it was so transacted and that the obligation in dispute was incurred, and that the memoranda made by these records were made in the usual and ordinary course of business, by the person whose duty it was to make the same.

It certainly cannot be seriously considered by the court that there is fraud in the preparation of corporate records where it appears that the person who claims adversely to such corporation in a cause where such records are offered in evidence, was present when such records were made and had knowledge of and participated in the matters set out in such records and leading up to the creation of the obligation such corporation seeks to enforce. Upon reason alone, without the aid of any precedent, the court could safely conclude such records were admissible as competent evidence to prove such claim or obligation against a third person under such circumstances. Besides, he would not be a "third person," or "stranger" within the meaning of the authorities.

"Corporate books are competent evidence against directors and officers who have had access to and have examined the books."

Vol. 3, Cyc. of Evidence, page 656

Smith v. North Carolina RR. 68 N. C. 107

New England Mfg. Co. v. Van Dyke, 9 N. J. Eq. 498

Eigeman v. Rockford Bldg. Ass'n, 79 Ind. 41

Hamilton Buggy Co. v. Iowa Buggy Co., 88 Ia. 36

In the case of Hamilton Buggy Co. v. Iowa Buggy Co., 83 Ia. 36, it was stated:

"While the entries in the books of a corporation are not evidence as against *strangers*, yet where there was evidence that the defendant and the intervenor used the same books and that the intervenor owned the defendant, held, that there was no error in permitting the books to be introduced as against the intervenor though they were designated as the defendant's books."

The rule contended for by appellant seems to be more liberally enforced where it appears that such records are shown to be a part of *res gestae*.

It is clear from what has been hereinbefore stated, that the signing of the agreement of March 28, 1870 by Ben Holladay & Company was contemporaneous with the making of the records appearing upon pages 160 to 208 of Exhibit 7 (pages 393-440 transcript, Vol. I). A reading of these

pages will show that Ben Holladay had knowledge of all matters herein set forth.

Terry v. Birmingham Natl. Bank, 93 Ala. 609, in which the court said:

> "The books of a stock exchange are not admissible as evidence against the pledgar, whose stock was sold on the ground that his power of attorney had made the corporation his agent to sell, unless it is shown that the entries were made contemporaneous with the sale or so near as to come within the principle of *res gestae*."

Flemming et al vs. Yost et al, 137 Ind. 95, in which the court stated:

> "In an action to set aside a conveyance as fradulent, the grantee may introduce in evidence various amounts of money paid to the grantor at various times, the entries being made at the time of payment; such evidence being admissible as a part of the *res gestae*, to illustrate and bring out fully the whole transaction in regard to the transfer and the consideration therefor."

Other authorities to the same effect:

> Greenleaf on Evidence, Sec. 120, Vol. I.
> Elliott on Evidence, Sec. 164, Vol. I—
> Also, Secs. 537-541, 2 and 3 of same book.

Would anyone pretend that in the absence of fraud, Ben Holladay could dispute the facts recited in the corporate records which he, as a majority stockholder, had made and caused to exist?

There is no reason for enforcing the rule, that

corporate records are not admissible against strangers to such records, where it appears that the corporate records and books are offered in evidence to prove a claim against one of its members, especially where it is shown that he had knowledge and acquiesced in the making of such records.

It appears from the statement of Ben Holladay himself that he was a stockholder (see pages 2 and 3 of Exhibit 52, which is Ben Holladay's affidavit in the case of John Nightingale et al. vs. Oregon Central R. R. Co., et al. (pages 1477-1478 transcript, Vol. III). wherein he stated as follows:

> "I admit and state the fact to be and so it is that on or about the 7th day of September, A. D. 1869, said Oregon Central Railroad Company, defendant herein, did, acting by and through its then board of directors, each and all of whom acted fairly and in good faith and according to their best judgment and without any confederation, collusion or fraud, and for a valuable and adequate consideration, cause to be issued and delivered to this affiant and in his name 39,930 shares of the capital stock of the defendant the Oregon Central Railroad Company".

There certainly could be no better evidence that he was a stockholder in the Oregon Central Railroad Company than the above quotation from the affidavit of Ben Holladay.

We also have further proof to the same effect, (see pages 15 and 16 of Exhibit 26 page 1318

transcript, Vol. III), which is a recital from the contract between the Oregon Central and the Oregon & California R. R. Co., to the effect that the firm of Ben Holladay & Company were the owners of 64,661 shares of the stock of the Oregon Central R. R. Co.

> "The plaintiff after introducing in evidence the certificate of stock held by the defendant offered the company's *stock* certificate books and ledgers to show that he was an original shareholders and that his stock was only partly paid. These books were properly admitted. It has been said by some courts that a corporation's stock books are in all cases evidence in its favor to show that the names it has entered as shareholders are such in fact. Citing Turnbull v. Payson, 95 U. S. 418. This doctrine, however, has never obtained in this state and rests on no solid principle."
>
> "But where the relation of shareholder has been otherwise shown to exist the books of the corporation become admissible to aid in determining when it commenced and what if anything has been paid upon the shares. Shareholders in a moneyed corporation by a contract of membership constitute it their agent and keep such stock books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them though not conclusive."
>
> Carey v. Williams, 79 Fed. 906.

Thompson on Corporations, Section 1857, p. 928, states in connection with the above.

> "In order to render such books and records

admissible it should be shown by some competent witness that such books are kept in the ordinary course of business and that the entries made therein were made in the due and ordinary course of business; and either that certificates of stock were issued and delivered to the person sought to be charged, *or that he took part in the meetings of stockholders during the period of time his name appeared upon the books, or both.*"

It has been urged, however, by counsel for the defendant that where an attempt is made to establish title to real property by records of a corporation wherein an alleged copy of an alleged lost instrument conveying or agreeing to convey real property is set out, that a greater degree of proof is required as to such instrument being legally executed, and that the exclusionary rules of evidence are enforced more rigorously where an attempt is made to establish title to real property in the manner stated above.

It might be urged for that reason that the authorities just cited are not in point. Upon reason, however, it is readily seen that so far as the ultimate result of admitting such evidence is concerned, the effect might be just as disastrous if such evidence was improperly admitted in cases to enforce payment of sums due on stock subscriptions or other indebtedness, for the reason that it is well known and understood that a judgment of record is an incumbrance against real property and

upon execution real property could be sold by such judgment creditor, and title of the judgment debtor to such real property could thereby be divested. The objection goes to the weight and not to the competency of the evidence.

Complainant has been unable to find in any of the cases cited by defendant any authority for holding that where it is shown by the evidence that entries and other records appearing upon books of a corporation have been made by and with the knowledge and consent of the stockholder or other person, that such records are inadmissible to prove certain facts therein recorded against such person having such knowledge.

This principle is governed by the law of evidence relating to admissions. Its admissibility does not depend in that instance upon the ground that it is a corporate record but that it is a writing made by the party or admitted by him to be correct.

Before passing we will at this time show that according to the rules of evidence relative to admissions that the affidavit (Exhibit 52) is properly before the Court for the purpose of showing that Ben Holladay had notice of the matters and things recorded from pages 160 to 208 of Exhibit 7. (see pages 393 to 408 of transcript Vol. I)

From the decision just above quoted, it will appear that even where entries were made by clerks of the corporation, that such entries may be deemed

to have been made for and on behalf of the stockholders.

Further, if upon considering the other circumstances tending to show that Ben Holladay was present when these records were prepared, it would aid the Court in deciding whether or not he was so present, (to determine whether or not he was a stockholder,) then such affidavit would clearly be admissible even though the question as to whether or not he was a stockholder was not one of the issues raised by the pleadings. This is a question for the Court to decide.

> "By the term 'relating' we do not mean that the evidence shall be addressed with positive directness to the disputed point, but we mean evidence which, according to the common course of events, either taken by itself or in connection with other facts, proves or renders probable a past, present or future existence of the other."
>
> Seller vs. Jenkins, 97 Ind. 430-38.

Aside from the objection that it is not addressed to any issues in the pleadings, it being an admission of Ben Holladay and defendant being herein a privy in interest, such affidavit is admissible to prove that he was a stockholder and as such in all probability knew of the recording of the alleged lost agreement (pages 175 and 176 of Exhibit 7, pages 408, 409 transcript, Vol. I).

"The admissions of a party to a fact wher-

ever or however made, are evidence against him when pertinent to the question involved in the case on trial."

Robbins v. Butler, 24 Ill. 388
Hayman v. Wheeler, 29 Fed. 347.

DID BEN HOLLADAY HAVE KNOWLEDGE OF MEETING OF MARCH 28th, 1870?

The next inquiry, and one which is pertinent at this point, is there any evidence in the record to prove that Ben Holladay was present at the meetings which, from the records appearing upon pages 160 to 187 of Exhibit 7, appears to have been held on or about the 28th day of March, 1870, and did he have knowledge of the events recorded upon the pages coming before page 175, (page 408 of transcript, Vol. I) and of the events appearing of record on pages subsequent to page 177, of said Exhibit 7 (page 409 transcript, Vol. I). Complainant contends that there is evidence in the record which clearly establishes the above proposition beyond any question.

For a starting point to show that Ben Holladay had knowledge of all these transactions and participated in them, we will first direct the Court's attention to one parcel of evidence which defendant cannot object to as being a fiction.

In Exhibit 26 (see pages 1298 to 1332 transcript, Vol. III) we have a certified copy of the deed from the Oregon Central to the Oregon & California R. R. Co., which embodies a part of

the records of the Oregon Central minute book (Exhibit 7). Before entering upon the discussion of the relevancy of this document to the point to be made, we will first consider defendant's objection to its admission.

In brief, defendant contends that it is not the best evidence to prove the existence of the alleged lost instrument; that no foundation has been laid for introducing it as secondary evidence, and that it is incompetent as not describing the property in dispute as being a part of the property to be conveyed by the Oregon Central to the Oregon & California R. R. Co.

The last objection is the only one which need be considered at this time, as the other objections will be satisfied when it is shown hereinafter that the agreement of March 28, 1870 (the alleged lost agreement) was lost and that a proper search has been made to locate same, and that it has not been found.

Defendant's objection that the said Exhibit 26 is incompetent if offered to show that the Grindley and Elliott tracts were conveyed to the Oregon & California R. R. Co., by the Oregon Central, because it does not sufficiently describe these tracts cannot be sustained.

> A writing agreeing to convey all of the real property of a grantor within the State of Oregon, especially in Multnomah and Clackamas Counties is not void as being too indefinite and

uncertain in a description of the property to be conveyed to be enforced, but will pass title to all of the real property to the grantee within the said counties and state.

Tiffany on the Law of Real Property, Vol. 2, Sec. 387, p. 882
Wilson v. Boyce, 92 U. S. 325.

This agreement between the Oregon Central and the Oregon & California R. R. Co., contains practically all of the proceedings recorded upon pages 180 to 208 of Exhibit 7 (pages 393 to 440 inclusive of transcript Vol. I) and resolutions and matters relative to the execution of the alleged lost agreement acted upon by the directors and stockholders are embodied in and made a part of this agreement.

It is set out in this agreement that the Oregon & California R. R. Co., was organized (page 3, Exhibit 26, see page 1303 of transcript Vol. III) and that a proposition was made by such corporation to the Oregon Central through its president, Ben Holladay (which proposition was in the form of a resolution passed by the board of directors of the Oregon & California R. R. Co.), empowering him to enter into negotiations with the Oregon Central for the purchase of its railroad and other property. This proposition was submitted by Ben Holladay over his own signature (see pages 4 and 5 of Exhibit 26—pages 1303-1304 and 1305 of transcript Vol. III). This proposition was accepted by the directors of the Oregan Central *subject to the ap-*

proval of the stockholders (see top of page 6 of Exhibit 26—pages 1305 and 1306 of transcript Vol. III).

In the resolution passed by the board of directors accepting the above offer, it was recited, among other things, that the Oregon Central was *indebted to divers persons, principally to Ben Holladay & Company in the sum of approximately $800,000.00, which the Oregon and California Railroad Company agree to pay unto Ben Holladay & Company* in consideration of the transfer by the Oregon Central of all of its property to the Oregon and California Railroad Company (see page 7 of Exhibit 26—page 1307 of transcript Vol. III).

The action of the directors of the Oregon Central in accepting the offer made by the Oregon & California R. R. Co., was ratified at the special meeting of the stockholders called for such purpose (see pages 17 and 18 of Exhibit 26, pages 1320 and 1321 of transcript Vol. III).

The Court's attention is particularly called to the reference made to directors meeting held on March 14, 1870, at which a resolution was passed to call such meeting (pages 14, 15 and 20 of Exhibit 26, pages 1316, 1317 and 1318 of transcript Vol. III), where it is stated that a special meeting of the stockholders of the Oregon Central was to be held on the 28th day of March, 1870 for the purpose of determining the propriety of dissolving the Oregon Central Railroad Company and settling up its busi-

ness, disposing of its property and the division of its capital stock (see page 15 of Exhibit 26, page 1318 of transcript Vol. III).

On pages 15 and 16 of Exhibit 26, (page 1318 of transcript Vol. III) immediately following, it is recited that such meeting was held and that all of the stockholders were present, *including Ben Holladay & Company*, who were the owners of 64,661 shares of the stock of the Oregon Central, and that at this meeting the Oregon Central was to be dissolved upon the settlement of its affairs and the sale and conveyance of its property and franchises.

At the bottom of page 20 of Exhibit 26 (see bottom of page 1321 of transcript Vol. III) it is stated again that the Oregon and California R. R. Co. is to pay all debts of every kind or nature of the Oregon Central.

It appears from this Exhibit 26 (see pages 1317 and 1318 of transcript Vol. III) that on the 14th day of March, 1870 the sale of the Oregon Central to the Oregon & California R. R. Co. seems to have been anticipated by the Oregon Central notwithstanding, as we have shown, that the proposition to purchase was not made until the 28th day of March following (see page 4 of Exhibit 26, see pages 1310-11-12 of transcript Vol. III). This fact is significant when considered with the other matters above referred to.

At the meeting of the stockholders on the 28th day of March, 1870, it appears that the firm of

Ben Holladay & Company were the holders of practically all of the stock of the Oregon Central (and as has hereinbefore been shown, Ben Holladay was the principal owner in the firm of Ben Holladay & Company—see page 1 Exhibit 24, page 1184 of transcript Vol. III). From this fact there can be no error in concluding that Ben Holladay caused the meeting of the board of directors of March 14, 1870 to be held and that he controlled the proceedings thereof, and that it was at his instance that the resolution was passed authorizing him to purchase for and on behalf of the Oregon and California R. R. Co. all of the property of the Oregon Central.

This becomes more evident when considered in connection with the fact that it is also made a part of the minutes of the meeting of March 28, 1870 that the proposition to purchase the Oregon Central by the Oregon & California R. R. Co. was submitted by *Ben Holladay personally*, and further, that the Oregon & California R. R. Co. was to pay the firm of Ben Holladay & Company the sum of $800,000.00 in part consideration for the covenants and agreements to be performed by the Oregon Central (said sum being the amount which had been determined to be due the firm of Ben Holladay & Company for building the said railroad). In this connection the court's attention is called to the following excerpt from Ben Holladay's affidavit which appears on pages 1475 to 1508 of the transcript, Vol. III:

"I deny that the property, rights and franchises and subsidies which were transferred, or which purports to be transferred by said Indenture mentioned in subdivision 17 of complaint herein were on the 28th day of March 1870, or at any other time of the value of seven millions of dollars or of any greater value than from $800,000 to $1,000,000. I deny that they are now of that value, and I aver that the addition to their value has been solely by reason of money since then expended upon it by the Oregon and Cal. Railroad Co. I deny that the said Oregon and California Railroad Company has not paid any money or other valuable thing for said sale and transfer, but I aver and state the fact to be, that said Oregon and California Railroad Company has paid all debts and liabilities of said Oregon Central Railroad Company, and caused all its obligations to be surrendered and cancelled, towit, an indebtedness of over $800,000."

Here we have an admission from Ben Holladay that the said sum of $800,000 was paid by the Oregon & California Railroad Co. the successor of the Oregon Central Railroad Company, and that Ben Holladay was the principal beneficiary of this sum is established beyond question by connecting the above admission with the recitals in the alleged lost agreement (see pages 408 and 409 of transcript, Vol. I), to the effect that the Oregon Central Railroad Company was to pay Ben Holladay & Company for all moneys laid out, expended, and

incurred in building the first 20 miles of its railroad, an amount not less than $800,000. These are very significant circumstances, and it would be very difficult to imagine by what process of reasoning it could be concluded that Ben Holladay was not at the very bottom of all these preliminary movements that resulted in absorption of the Oregon Central by the Oregon & California Railroad Co.

The very fact that it appears, as has been said above, that it was agreed as a part of the consideration for this transfer that the firm of Ben Holladay & Company were to be paid the sum of $800,000.00 by the Oregon & California R. R. Co. the corporation of his own creation, is sufficient to justify a conclusion that he had sufficient interest in these matters to have been on hand when they were being consummated, especially in view of the fact that it has been shown that he would be the principal beneficiary of the said sum as being the principal owner of the firm of Ben Holladay & Company. This is so self-evident that no further detailed discussion is necessary or will be indulged to convince the court that Ben Holladay was the moving and directing spirit in all these transactions as evidenced by pages 160 to 208 of Exhibit 7, pages 393 to 440 of transcript, Vol. I.

We are, however, not dependent entirely upon these circumstances alone to establish the above fact, but have the statement of Ben Holladay

under oath that he was present and had knowledge of all that transpired relative to the execution of these agreements of March 28, 1870 (the alleged lost agreement) and March 29, 1870, as is recorded on pages 175 to 208 of Exhibit 7, page 408 of transcript, Vol. I). In his affidavit in the suit entitled John Nightingale et al vs. Oregon Central R. R. Co. et al (Exhibit 52), he states as follows:—Quoting—(from page 1479 of transcript, Vol. 3)

> "I admit that in March, 1870, the capital stock of the Oregon Central was cancelled by the stockholders and directors of that Company, towit, on the *28th and 29th days of March, 1870*, at the date of dissolution of such Company, as will more fully appear from other portions of this affidavit."

Quoting further: (page 1479 of transcript—Vol. III)

> "I deny that the proceedings of said stockholders meeting held on the *28th day of March, 1870*, or at any other time, or of said directors in causing the execution of said indenture referred to in subdivision 17 of complaint, were dictated or controlled by me or that each and every or any of the stockholders present at said stockholders meeting voted in favor of said sale or transfer at the request of or at the dictation of myself, or as my tools or confederates. I admit that it was the common judgment of all *said stockholders and directors and myself that such proceedings then had was for the best interests of all con-*

cerned in said Oregon Central Railroad Company."

Quoting further from page 7 of said affidavit:— (page 1483 of transcript Vol. 3)

"That said 3700 shares of stock now claimed by said Nightingale has never been transferred on the books of said Oregon Central, but were on the 28th day of March, 1870 yet standing on said books in the name of A. J. Cook, at which time said Oregon Central was legally dissolved by a vote of two-thirds of its stock at a meeting duly and legally called for such purpose at the office of the company in Salem, Oregon."

Quoting further: (page 1484 of transcript Vol 3)

"That a copy of the resolution passed by the directors of the Oregon Central Railroad Company calling such meeting of the stockholders of said company to meet on the 28th day of March, 1870, for the purpose of determining the propriety of and authorizing the dissolution of such corporation, the settling of its business, *disposing of its property and division of its capital stock*, and also a copy of the notice of such meeting, which notice was published by the said corporation, is attached to the complaint herein (referring to the case of Nightingale et al vs. Oregon Central et al). That at such meeting of the stockholders and in pursuance of such notice the sale of all its property was made for the purpose and in the manner and for the reasons as will more fully appear *by the recitals in*

> *said deeds, of conveyance*, a copy of which is given on pages 298-311 inclusive, in said exhibit attached to complaint herein (referring to the case of Nightingale et al vs. Oregon Central et al), and said Oregon Central Railroad Company was then duly and legally dissolved, and all its stock legally cancelled in strict compliance with the statutes of Oregon in such cases made and provided, etc., all of which proceedings were ratified and confirmed by the directors of said Oregon Central at a meeting duly called and legally held at the office of the company on the same date."

This affidavit contains many more statements showing beyond any question that Ben Holladay was fully informed and advised as to all that is narrated upon pages 160 to 208 of Exhibit 7, (pages 393 to 440 of transcript, Vol. I) but what has above been quoted will be sufficient in connection with the circumstances just above related to remove all doubt as to whether or not he had knowledge of such facts. We have already shown above that this affidavit is properly before the court. (See pages 1507 and 1508 of transcript, Vol. III) It has been urged by counsel for defendant that Ben Holladay's affidavit has not been properly identified. The court's attention is called to the testimony of R. Koehler, on page 901 of the transcript, Vol. II, as follows:

Q. Mr. Koehler, I will ask you to look at this original affidavit, and state whether or not that

is the original signature of Ben Holladay, which is marked filed in this case June 22nd, 1871?

A. *Yes it is.*

It would hardly seem necessary to cite any further authorities in support of the proposition that the records of the Oregon Central are admissible as secondary evidence to prove the existence, execution and delivery of the alleged lost agreement of March 28, 1870, in so far as defendant's objection that they are incompetent as being self-serving, are concerned, but we will refer the Court to a few authorities which bear directly upon the point.

In Section 727, Cook on Corporations, 5th Ed. Vol. 3, it is stated:

> "The minutes of a meeting of a corporation are admissible to show what took place as *against members who attended the meeting.* Booth v. Dexter, 118 Ala. page 369, in which the Court stated: 'In an action brought by a corporation on a promissory note given by one of its stockholders who had served as treasurer, in the settlement of a claim against him for the loss of corporate funds, the minutes of the meeting of the plaintiff corporation, at which the defendant was present and when action was taken regarding the giving of the note sued on, are admissible in evidence for the purpose of showing what was done at said meeting in reference to the giving of the note by the defendant and its acceptance by the plaintiff in settlement of its claim against him'.

"A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto. Where a party owns all of the stock of a corporation it has been held that he is chargeable with entries upon its books, and the Court again cites Hamilton Buggy Co. vs. Iowa Buggy Co., 88 Iowa 364" (which has been referred to hereinbefore).

"In like manner they may constitute admissions on the part of the members of the corporation, when the circumstances are such that the members can be deemed conversant with their contents. Thus, *the books of a bank showing its account with the* president, *who had access to such books, may* be admitted in an action against him by a receiver of the bank to show the state of accounts with the bank, or to show, in such action, the proceedings of a directors' meeting. *Although in general the books of a corporation are not competent evidence to affect strangers, they are admissible as between the members on proof of knowledge on their part of such entries.*"

Jones on Evidence, pocket edition, p. 655-656
Olney v. Chadsey, 7 R. I. 224
Chase v. Sycamore Ry. Co. 38 Ill. 215
Union Bank v. Call, 5 Fla. 409
Cook, Corp. (5th Ed.) Sec. 727

It has been hereinbefore shown that Ben Holladay is not a stranger to the matters and things recorded in the Oregon Central Railroad Company's minute book, Exhibit 7.

"Now, if the fact of subscription was susceptible of proof at all by secondary evidence, here were circumstances that speak trumpet-tongued in favor of it; circumstances more definite and conclusive in their nature than those which have condemned many a man to the gallows. *The corporation books, though not generally evidence against a stranger, are so against a corporator present and assenting to the entries made in them:* 4 W. & S. 373. They were properly admitted against the defendant, for the letters patent were prima facie evidence that he was a corporator; and, taken in connection with his acts and declarations, they persuade irresistibly to the conclusion that he was a subscriber."

Graff v. The Pittsburg etc. R. R. Co., 31 Pa. St. 495

It is undoubtedly true that entries made in the due course of business, by officers authorized to make them, are admissible in evidence against the stockholders. This is said to be on the theory that the officer, in making such written entries, acts as the agent and representative, not only of the corporate entity, but as the stockholders regarded as unincorporated partners. *And such records were held competent against a corporator who was shown to have been present at the time of the transactions therein recorded, and to have assented to the entries made.*

Zang v. Wygant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. 145

Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. 399
Graff v. Pittsburg etc. R. Co., 31 Pa. St. 489

A reading of the affidavit of Ben Holladay (pages 1475 to 1508 of transcript, Vol. III) will show that he admitted repeatedly that he was in attendance at the meetings of the Oregon Central Railroad Company, and that he was fully informed of all that transpired at such metings.

The better rule undoubtedly is that corporate books alone are not even prima facie evidence of a contract of membership, and are not admissible against a person denying his liability as stockholder; they cannot be received as the sole dispositive evidence of any such disputed fact. *In order to render such books and records admissible it should be shown by some competent witness that such books are kept in the ordinary course of business, and that the entries made therein were made in the due and ordinary course of the business;* and either that certificates of stock were issued and delivered to the person sought to be charged, *or that he took part in the meetings of stockholders during the period of time his name appeared upon the books or both.* The book or record should be supplemented by identifying testimony.

Zang v. Wygant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. 145
Adams v. Clark, 36 Colo. 65, 85 Pac. 642
Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. 399

Foote v. Anderson, 123 Fed. 659
Union Sav. Bank v. Williard, (Cal.) 88 Pac. 1098
Holland v. Duluth Iron Min. etc. Co. 65 Minn. 324, 68 N. W. 50, 60 Am. St. 480

The general rule as to the admissibility of corporate records is clearly and fairly stated in the preceding paragraph, and directly bears upon the present dispute. It has been clearly pointed out hereinbefore that these records of the Oregon Central Railroad Company as evidenced by Exhibit 7, (pages 380 to 440 of transcript, Vol. I) were made in the due and ordinary course of business, by one whose duty it was to keep such records. It has also been shown that these records were produced by the proper custodian, and that the signature of the person who made the entries therein have been recognized by persons now living.

CORPORATE RECORDS.

"For the purpose of showing that under the successive statutes re-enacting St. 1811, c 6, Sec. 3, now R. L. c. 37 Sec. 12, an unincorporated religious society had acquired by a continuous adverse possession of twenty years, a title to certain land by limitation, entries from the record book of the society are admissible to show its original organization and a vote to purchase the land in question and to erect a house of worship thereon, and if the entries in the record book are certified to by a

deacon of the church as clerk of the meeting, to whom in his own name a deed of the land in question was made, immediately after the vote of the society to purchase it, the record is relevant to establish the fact that in taking the deed of this land in his own name he was acting in behalf of the society and was not purchasing it for himself."

First Baptist Church of Sharon v. Harper, 191 Mass. 196

The case just cited bears a close analogy to the case at bar, inasmuch as the corporate records were used to establish title to realty claimed by an individual who participated in meetings of the society whereat such records were made.

On pages 1483 and 1484 of transcript, Vol. III, (excerpts from Ben Holladay's affidavit) the agreement of March 28th, 1870, is in part identified, as has been hereinbefore more particularly stated. (See page 53 supra) It has been held that where the contents of an instrument have been admitted, that the opposite party is relieved of the burden of proving it.

"A party, also, who admits a document to have certain contents, may relieve the opposite party from producing such document."

Wharton on Evidence, Sec. 165, 8th Ed.

The trial judge, R. S. Bean, in announcing his opinion, seemed to be guided largely by the doc-

trine as to the admissibility of corporate records, by the law as stated by the following authorities:

Thompson on Corporations, Sec. 7740, Vol. 6.
Carey v. Williams, 79 Fed. 906
Hayden v. Williams, 96 Fed. 279
Edwards v. Bates, 117 Fed. 526-537

These authorities were cited by counsel for defendant in their trial brief, and were chiefly relied upon to bar the admission of the minute book of the Oregon Central Railroad Company, as secondary evidence of the existence, execution and delivery of the agreement of March 28th, 1870.

After a careful examination of all of these authorities we fail to find that they support defendant's position. Section 7740 of Thompson on Corporations makes no reference to the subject in dispute. This author, however, does support appellant's position, that where from the evidence it appears that a stockholder was present and participated in the proceedings of a meeting of the directors or stockholders, he is bound by such minutes.

Thompson on Corporations, Sec. 1857, p. 928, Vol. 2, 2nd Ed.

The following quotation from the opinion of the court in the case of Carey v. Williams, supra, will show that the rule applied therein cannot be applied to the state of facts in the case at bar.

"Inasmuch as there was no evidence of the alleged admission of the defendant, the only evi-

dence in the case tending to prove that he was a stockholder was that consisting of the entries in the books of the corporation. We are thus brought to the important question in the case, which is whether the entries contained in the corporate books of the company afforded prima facie evidence that the defendant was a stockholder. The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties. The assent is evidenced when the name of the stockholder appears as such upon the books of the company; as to the corporation, by its act in placing his name there; and, as to the stockholder, by his knowledge and acquiescence in the act. It is not enough that he appears to be a stockholder upon the books, and when this occurs without his sanction he incurs no liability as such."

The court's attention has been directed to evidence, (see affidavit of Ben Holladay, pages 1475 to 1508 of transcript, Vol. III) which clearly connects Ben Holladay with these proceedings of the Oregon Central Railroad Company, as evidenced by their minutes of March 28th, 1870.

The law on this question as announced by Hayden v. Williams, and Edwards v. Bates, supra, is substantially the same as is announced in Carey v. Williams, supra, and is applied under substantially the same circumstances.

In the case of Fish, Receiver, v. Andrew H. Smith, 73 Conn. 377, 391, the court in commenting

on the case of Carey v. Williams, supra, had this to say:

> "Where the relation of stockholder has been otherwise shown to exist, the books of the corporation become admissible to aid in determining when it commenced and what, if anything, has been paid in upon the shares. *Shareholders in a moneyed corporation, by their contract of membership, constitute it their agent to keep such stock books as are usually kept by similar organizations; and the entries made in due course of business are admissible against them, though not conclusive.*"

In the present case it has been clearly established that Ben Holladay was the principal stockholder in the Oregon Central Railroad Company and that he participated in the proceedings of March 28th, 1870, and that he executed the agreement of March 28th, 1870, as is evidenced by the corporate record of said date.

If it should be the opinion of the Court that the facts above related as to Ben Holladay having knowledge of the entries referred to in Exhibit 7, were insufficient to charge the defendant with notice of the matters and things recorded in said Exhibit 7 as being a privy in interest, then the complainant contends that for other reasons this minute book should be admitted.

From the testimony of R. Koehler, it appears that the persons who kept and prepared the records appearing upon pages 393 to 440 transcript, Vol.

I, (see R. Koehler's testimony, pages 689-693 of transcript, Vol. II) are not now living; that he knew Mr. S. A. Clark, who was secretary of the Oregon Central and that he recognized the signature in the book just referred to containing Exhibit 7 appearing upon pages 1 to 134, (pages 393 to 440 of transcript) as that of S. A. Clark. And further, that he also recognized the signature of George E. Cole, secretary of the Oregon Central, who succeeded S. A. Clark; also of the president, I. R. Moores appearing on pages 136 to 208, and that all of these gentlemen have long since died.

CORPORATE RECORDS ARE ADMISSIBLE AS EVIDENCE AGAINST THIRD PARTIES EVEN THOUGH THEY ARE SELF-SERVING.

> "Even though entries appearing in books of a corporation are only admissible to prove its charter and organization, election of officers, etc., and other corporate acts and not for the purpose of proving its claims against third persons, or its stockholders whose interests are adverse to such corporation, where, however, it appears that such entries were made by persons since deceased and that they were made in the regular and due course of business by one whose duty it was to make them, and who at the time had no interest to misrepresent the facts, then such records are admissible."
>
> Wheeler et al vs. Walker, 45 N. H. 358-9

"What a person, having in charge a particular trust or duty, does in pursuance of that trust or duty is an act which may be proved by other testimony than that of the party who does the act, when he is dead and the testimony entirely lost."

Welch v. Barrett, 15 Mass. 384

In Bland v. Warren, 65 N. C. 273, it is said:

"Self-serving entries made by a merchant were not admissible but where made by a clerk since deceased, are competent evidence of the matters they contain."

Also, see Chaffee & Co. vs. U. S., 85 U. S. 541, in which the Court said:

"And the rule, with some exceptions, not including the present case, requires for the admissibility of the entries not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or be proved by their handwriting if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subject to cross examination, affords the greatest security for truth. *Their declarations, verbal or written must, however, some times be admitted when they themselves cannot be called in order to prevent a failure of justice. The admissibility of the declarations in such cases is limited by the necessity upon which it is founded.*"

HAS MINUTE BOOK OF OREGON CENTRAL RAILROAD CO. BEEN PROPERLY IDENTIFIED?

Counsel for the defendant contends that the Oregon Central Minute Book is not sufficiently identified or authenticated to be admitted, and before proceeding further we will show that this objection cannot be sustained. As to what must be shown the Court is referred to the following:

> Thompson on Corporations, Sec. 1852, Vol. 2.

This author lays down the general rules as to the authentication and identification of corporate records as follows:

> "Before the records of a corporation are admissible in evidence for any purpose, on any theory, it must be made to appear *prima facie at least* that they are books of the corporation, and that they have been kept as such and that the entries therein were made by the proper acting officer. Such books do not generally prove themselves and do not carry within themselves intrinsic evidence of their authenticity to justify an introduction of the record. It has been held that it must be shown that the entries were made by the proper officer, *and generally such officer must be produced, or if dead, his hand writing be proved. Such proof may be made by the secretary or by the person having the custody of the book, or by the bookkeeper, and in the case of his death, by the proof of his hand-*

writing. The corporate book was held to be sufficiently identified where the clerk testified that it came to him with other books of the corporation".

Elliott on Evidence, Sec. 1341, Vol. 2.

This author states:

"The authenticity of a record need not in all cases and in all jurisdictions be established by the legal custodian, but it may be sufficient for a *prima facie* case if it appears to come from the custody of the proper officer and is identified as a record of a particular office".

While the above refers more particularly to judicial records or public records, the same principle can be applied to the authentication of private corporate records.

Complainant has shown by the testimony of R. Koehler (pages 688 to 695 and 8 of transcript, Vol. II), and of Chas. B. Moores (pages 220 to 225 of transcript Vol. I) that there is before the Court the direct evidence of the hand writing and signatures of officers who prepared and signed the minutes of the Oregon Central Railroad Company appearing on pages 134 to 208, pages 393 to 440 of transcript Vol. I and that these officers are not now living.

On page 918 of transcript Vol. II of record, Mr. C. A. Dolph states in answer to the following question:

"I call your attention to the purported copy

> of this instrument at page 175 and 6 (referring to Exhibit 7, upon which are set out the alleged lost agreement of March 28, 1870), and will ask you whether or not all of that is in the handwriting of A. J. Moses, and if not, in whose handwriting it is?"

to which Mr. Dolph replied:

> "All of the record that is not in the handwriting of Mr. Moses, as I take it, is in the handwriting of Mr. Cole."

On page 892 of transcript Vol. II, testimony of J. C. Moreland, this witness was asked to identify the handwriting appearing upon pages 175 and 176 of Exhibit 7 just above referred to, and replied, after making an examination, that it was that of A. J. Moses, and that A. J. Moses had been dead a good many years; that he was at the time this record was made, a resident of the City of Portland, and was in the employ of Mitchell, Dolph & Simon, who were attorneys for the Oregon Central Railroad Company.

At the top of pages 687 to 688 of transcript Vol. II, testimony of R. Koehler, this witness states that he is an officer of the Oregon & California Railroad Company and that as such officer he acted and relied upon such records as being authentic, and on page 690 further states that the record of the agreement appearing upon pages 175 and 176 of said minute book (Exhibit 7) pages 408 and 409 of transcript Vol. I had been in this book ever since he, (R. Koehler), first saw said book.

From the testimony of L. F. Steel, it is shown that he was the custodian of the records of the Oregon & California R. R. Co., under the supervision of Mr. W. W. Cotton, as secretary, who succeeded Mr. George H. Andrews, as secretary his predecessor, and that he had the custody of the Oregon Central minute book (Exhibit 7) just referred to in connection with other records of the Oregon Central Railroad Company; that he was directed by Mr. Cotton to produce Exhibit 7, minute book of the Oregon Central Railroad Company, for and on behalf of the complainant at the taking of testimony before Mr. Geo. A. Brodie, U. S. Examiner, on the 16th day of September, 1911; that Exhibit 7 was one of the records received by Mr. Cotton as secretary from Mr. Andrews, as secretary his predecessor. (See pages 466 to 467 and 468 of transcript Vol. I).

Applying the rules of evidence relative to the authentication and identification of records above cited, to the foregoing facts, it is clear without entering into any further discussion of the subject, that Complainant's Exhibit 7 cannot be excluded from the record as not being sufficiently authenticated.

Even though it should not be sufficiently shown to the Court that Exhibit 7 (See pages 393 to 440 of transcript) has been properly identified, it should be admitted upon the ground that it is in itself an ancient record and when shown to have been produced from its proper custody, proves itself.

In the case of Goodwin v. Jack, 62 Me. 416, it is said:

> "The books offered in evidence purporting to be Pejepscot records, cover a period of more than one hundred years, and contain strong internal evidence of their own verity. There is no evidence to impeach their genuineness or their present existence by the proprietary or of any person authorized to represent it or having any proprietary interest therein. At the time of the trial they were in the possession of the librarian of the Maine Historical Society. Time has swept away all who could have testified as to the original organization of the association. To require such evidence or parole testimony in the ordinary way that the books are what they purport to be, would be practically to exclude these records from being used as evidence in any case affecting the title to any land originally derived from those proprietors. Under these circumstances we think that the books offered are to be regarded as proving themselves to be what they purport to be without parole or other evidence of their original organization or the regularity of their subsequent meetings. They are in fact the best evidence of those facts that is obtainable. The entries therein were made by authority of the party interested to preserve and perpetuate the evidence of certain transactions contained in letters and other fugitive papers liable to be lost or destroyed. Being found, as we have seen, among records that prove themselves after the lapse of more than one hundred years, these entries may

> properly be regarded as primary evidence, the presumption being that the originals have long since been lost or destroyed and no shadow or suspicion resting upon their authenticity."

While the above authority cannot be said to be directly in point it portrays a principle which is based upon logic and common sense. As argued in the case cited, if the contents of the records set forth in complainant's Exhibit 7 furnish strong intrinsic evidence of their own verity, upon what hypothesis should such records be excluded? The rules of evidence relating to excluding certain classes of evidence or testimony is based upon logical reasoning. Furthermore, the Court's attention is directed to the fact that there is not one single item of evidence in the record introduced by the defendant to show that there was any fraud or mistake in preparing, or in the production of the said minute book of the Oregon Central Railroad Company, or which would tend to show in the slightest degree that said record was not all that it purports to be.

The principle of reasoning upon which the above decision rests, existed prior to the formation of any technical rules of law, and we submit that the Court in considering whether or not Exhibit 7 should be admitted, will not find it necessary to search for any specific precedent to aid it in deciding that complainant's exhibit 7 is all that it purports to be, and being so, must necessarily be admitted.

IS EXHIBIT 14, WHICH IS THE MINUTE BOOK OF THE OREGON & CALIFORNIA RAILROAD COMPANY, PROPERLY BEFORE THE COURT.

The objections of counsel for defendant to the introduction of Exhibit 14 are substantially the same as he has made to Exhibit 7, with a few exceptions.

FIRST: It is contended that Exhibit 14 is incompetent,, irrelevant and immaterial.

From what has been stated hereinbefore (see pages 80 to 83 *supra*) it will no doubt be sufficiently clear without making a further examination of the facts, that the execution of the Frankfort Committee agreement is one of the circumstances which, to say the least, throws some light upon one of the main issues in dispute, towit, as to whether or not it was the intention of Ben Holladay in signing the agreement of March 28, 1870 (the alleged lost agreement) to include within its terms all of the lands purchased by Ben Holladay & Co. in connection with the construction of the Oregon Central Railroad Company's railroad from Portland twenty miles south. As has hereinbefore been shown (pages 62 to 84 supra) the lands in dispute were purchased by Ben Holladay & Company for the use of Ben Holladay & Company in and about the construction of the Oregon Central Railroad. It is only natural that in view of the general terms used in the agreement

of March 28, 1870, by Ben Holladay & Company, when agreeing to convey all of its property to the Oregon Central, and from whom the same property was acquired by the Oregon & California R. R. Co. that strangers assuming control as was being done at the time this Frankfort Committee agreement was executed by the European bondholders, would naturally ask for just such an agreement. This being so, the Court has a right to consider it in connection with other circumstances hereinbefore related as tending to establish that it was the intention of Ben Holladay & Company when signing the agreement of March 28, 1870 to convey the lands in dispute to the Oregon Central Railroad Company. That it is a material fact is too plain to take up the time of the Court by citing any great number of authorities. The following will suffice to settle the question.

In Brown v. Clark, 14 Pa. St. 469, it is stated:

> "Evidence relevant to the issue, although insufficient in itself to prove the same, should be admitted, especially if it is illustrative of other important facts involved in the action".

In Tolmi v. Dean, 1 Wash. Ty. 46, it is stated:

> "Although evidence offered fails to attain the full measure of what is required to sustain the party's allegations, yet if it is a connecting link in the chain of facts necessary for him to prove, it should be admitted and left to the jury to pass upon its sufficiency."

SECOND: That it is not the best evidence of any deed or other writing in issue, and that no foundation has been laid.

This objection will be covered by what will be stated hereinafter relative to the loss and search for the alleged lost agreement of March 28, 1870, this being the principal agreement which complainant wishes to establish as having been executed and delivered.

THIRD: That it has not been properly authenticated or identified.

We have already shown hereinbefore the manner in which this book was produced and have shown that it is the minute book of the Oregon & California Railroad Company, as it purports to be. (see page —, *supra*). In addition to what was there stated, see pages 930 and 931 of transcript Vol. II, where Mr. R. Koehler, witness for the complainant states that he recognizes the signature of *Ben Holladay* and other officers of the Oregon & California R. R. Co., appearing upon the pages of this minute book, and see page 489 of transcript Vol. I where Mr. L. F. Steel testified that Exhibit 14, which is Minute Book I of the Oregon & California R. R. Co., was in the custody of Mr. Cotton, secretary of the Oregon & California R. R. Co., and that it was received by Mr. Cotton from Mr. Geo. H. Andrews his predecessor. It also appears upon said page 489 that it was admitted by the attorneys for complainant and

defendant herein that this and all books which Mr. Steel had produced before Mr. Brodie, are part of the Secretary's books of the Oregon & California R. R. Co. On pages 466 to 468 of transcript Vol. I and preceding, it appears from Mr. Steel's testimony that he was the proper custodian and that he produced the said minute book No. 1 for and on behalf of complainant.

That Exhibit 14 is properly identified, the Court is referred to the authorities hereinbefore cited.

FOURTH: That the copy of the Frankfort Committee agreement appearing upon pages 191-2-3- and 4 and subsequent pages of Exhibit 14, (pages 1026 to 1042 inclusive of transcript Vol. II) is not an authenticated copy of the original even though its loss be established, and that no such agreement ever existed.

Upon pages 922-925 of transcript, Vol. II, from the testimony of Mr. C. A. Dolph, who was shown pages 190 to 204 of the said Exhibit 14, (pages 1026 to 1041 transcript, Vol. II) it appears that he and his brother prepared this and other agreements about the same date, in connection with Ben Holladay selling out his interest in the Oregon & California R. R. Co., and his retirement from the Company.

On page 924 of transcript, Vol. II, this witness states as follows, after being requested to look at the agreement appearing upon the pages just referred to:

> "This was, as I recall it, about the time that Mr. Holladay retired from his connection with any of these corporations and about the time he went East, as I recall it."

This shows that he was familiar with the circumstances connected with the execution of this agreement. In connection with this testimony, see page 614 transcript, Vol. II, (page 184 of Exhibit 14), where appears set out a telegram from Mr. Holladay declining to qualify for the position as director of the Oregon & California Railroad Company, and on pages 624 to 636 transcript, Vol. II, (page 192 of Exhibit 14, paragraph 1) it is shown that upon this date by an agreement in writing sell all his interest, which was the controlling interest in the Oregon & California R. R. Co. (See especially page 625)

Also see testimony of Mr. R. Koehler (pages 695, 696, 697 of transcript, Vol. II), where Mr. Koehler, in answer to question requesting him to explain fully the circumstances under which this Frankfort Committee agreement was made, stated:

> "This agreement was made after we had seen the impossibility of getting along with Mr. Holladay who, up to this time, was still in control of the road. Further, that it was deemed best to adjust the matter by buying Mr. Holladay out".

And in answer to the following question:

Q. "Was such an agreement in fact exe-

cuted by the parties who purported to have executed it?

"A. Yes.

Q. "What is the fact, if you know, as to whether or not the Oregon & California Railroad Company received the document in duplicate as stated in Mr. Villard's letter, as appears in these minutes, at the time of the execution of the instrument as indicated in the minutes?"

A. "A copy of the agreement was received."

Q. "Where was the agreement received, if you know?"

A. "From Mr. Villard."

Q. "This letter referred to in this minute book, appears to be addressed to the board of directors of the Oregon & California Railroad Company and appears to be dated at Portland, Oregon, April 19, 1876, and this meeting apparently was held on the 19th day of April, 1876, the same day. Were you a member of the board of directors, and were you at this meeting?"

A. "I was."

From this testimony it can hardly be said that this agreement was never in existence, especially when considered in connection with the following:

Exhibit 68 herein, see page 1042 of transcript Vol. II which is a certified copy of the deposition of Mr. Henry Villard taken in the case of Nightingale et al, vs. Oregon Central et al, wherein it appears that James L. King, a notary public, certified that on the 11th day of September, 1877, he com-

pared the foregoing copy of agreement (Frankfort Committee agreement) with the original thereof in the custody of the London & San Francisco Bank of San Francisco and that the same is a true, full and correct transcript therefrom and the whole of such agreement.

FIFTH: *Having clearly established the existence of this Frankfort Committee agreement, we will next consider defendant's objection that there is not sufficient evidence of its loss or evidence of a proper search having been made.*

As appears from what was just stated in the preceding paragraph, the original of this agreement was in the custody of the London & San Francisco Bank of San Francisco on the 11th day of September, 1877. (See page 1042 of transcript Vol. II).

From the testimony of Mr. R. Koehler (pages 698 and 699 of transcript Vol. II) he stated that as he understood it, this agreement was in the London & San Francisco Bank in San Francisco, California, which was a Bank in which Mr. M. S. Lathan, who was at the time the agreement was executed, president of the Oregon & California R. R. Co. kept his records, and that some time prior to the San Francisco fire in April, 1906, the London & San Francisco Bank was taken over by the Bank of California and these records were no doubt transferred to the Bank of California by the London & San Francisco Bank at this time.

SIXTH: It is further objected to as being in the nature of self-serving evidence.

This has been discussed to some extent hereinbefore. While it may appear that Exhibit 14 (Oregon & California minute Book) is in the nature of self-serving evidence, it becomes quite clear that it is nevertheless admissible by reading pages 160 to 208 of Exhibit 7 pages 393 to 440 of transcript, Vol. I in connection with pages 1 to 13 of Exhibit 14, wherein the same matters are referred to by both corporations. (see pages 496 to 499 of transcript Vol. I)

On pages 495 and 496 of transcript Vol. I (page 7 of Exhibit 14), appears a resolution dated March 26, 1876, which is the same as appears by copy upon page 170 of Exhibit 7. (pages 403 and 404 of transcript Vol. I) This was a resolution passed by the board of directors of the Oregon & California R. R. Co. *authorizing Ben Holladay to act as its agent to negotiate for the purchase of the Oregon Central.* This was an act, as has hereinbefore been shown, primarily initiated by Ben Holladay, who was at the time such resolution was passed, the principal stockholder in both the Oregon Central and the Oregon & California R. R. Co. See page 20 of Exhibit 14. (page 514 of transcript Vol. I pages 15 and 16 of Exhibit 26, (see bottom of page 1318 of transcript Vol. III and pages 1, 2 and 3 of Exhibit 52 pages 1475 and 1476 of transcript Vol. III).

The chief purpose, however, for which this exhibit was introduced, was to present to the Court the record of the Frankfort Committee agreement appearing upon pages 191 to 204 thereof. (pages 1026 to 1042 of transcript Vol. II)

To determine whether or not this can be said to be excluded as being self-serving evidence, depends upon whether or not it can be shown to be a record made with the knowledge of Ben Holladay. If it appears that he had knowledge of this agreement and that it was executed with his consent, then the rule that it is to be excluded as being self-serving evidence does not apply.

That it has been proven beyond question that such an agreement did exist, see pages 695, 696, and 697 of the transcript Vol. II, testimony of R. Koehler, who states in substance that he was present when the duplicate copy of this agreement was presented at a meeting of the directors of the Oregon & California R. R. Co. He also testified directly that the original was executed by the parties.

There also appears from the deposition of Mr. Henry Villard as one of the exhibits of the record (Exhibit 68) (See page 1042 of transcript Vol. II), that a copy of this agreement was attached to such deposition and certified to by James L. King, a notary public, as being a true copy of the original thereof in the custody of the London & San Francisco Bank of San Francisco.

It also appears from Mr. Koehler's testimony

that he was present when this agreement was signed by H. Hampton, Ben Holladay's attorney in fact (pages 696 and 697 of transcript Vol. II); also that Ben Holladay at this time sold out his entire interest in the Oregon and California R. R. Co.—see page 696 of transcript Vol. II; also paragraph 2 of page 192 of Exhibit 14 (page 625 of transcript Vol. II). In accordance with this, there appears upon page 614 of the transcript Vol. II (page 184 of Exhibit 14) a copy of a telegram from Ben Holladay stating that he declined to be re-elected as an officer of the Oregon & California Railroad Company.

All of these circumstances speak in very strong terms in favor of complainant's contention that Ben Holladay had knowledge of the existence of this Frankfort Committee agreement. In view thereof, upon what principal of law can it be held that the copy of this agreement appearing upon the records of the Oregon & California minute book is self-serving evidence and should therefore be excluded?

> "In an action by a corporation as a holder of a first mortgage against the defendant, on his contract assuming to pay such mortgage, it was held proper to permit the corporation to put in evidence its constitution and by-laws, fixing the payments due on the mortgages, and an order of its board of directors authorizing an assignment to the defendant of the mortgage on his performing his part of the contract."

Eigenman v. Rockport Bldg. & Loan Assn. 79 Ind. 41.

Furthermore, corporate records are admissible, and are prima facie evidence of the fact there stated, and particularly as to stockholders or persons dealing with such corporation.

WAS THIS FRANKFORT COMMITTEE AGREEMENT LOST AND HAS A PROPER SEARCH BEEN MADE TO LOCATE IT.

Referring to Exhibit 68 (see page 1042 of transcript Vol. II) herein, which has just been above referred to, it appears that this agreement was in the London & San Francisco Bank at San Francisco, California, on September 11, 1877. This establishes beyond any doubt that this agreement did exist.

This agreement was no doubt destroyed in the San Francisco fire of April 16, 1906, for the reason that it appears from the testimony of Mr. L. F. Steel, pages 852 and 853 of transcript) that he was unable to find the original of this agreement after making a search through the records of the Secretary's office of the Oregon & California R. R. Co., which is the place where such agreement would most likely have been if it were still in existence. It has already been shown that Mr. Steel was the custodian of records of this corporation under Mr. W. W. Cotton its secretary.

On pages 772 and 773 of the transcript Vol. II, from the testimony of Mr. B. A. McAllister, one of complainant's witnesses, it appears that he caused a search to be made through the files and storage places of the office of the Oregon & California R. R. Co., in San Francisco, for various documents pertaining to miscellaneous lands, and that he was unable to locate any of these papers, and that he had been informed that they were burned in the fire.

In this connection, see the testimony of Mr. W. D. Kelly, (pages 755, 756 and 757 of transcript Vol. II), where he states in substance that he was in the employ of the Oregon & California R. R. Co.'s Land Department in San Francisco, and that in connection with his duties he had access to various records and documents pertaining to miscellaneous lands. On page 757 the witness fully explains in just what manner he acquired his knowledge. He also states that just prior to the fire he saw a great many papers pertaining to miscellaneous lands in the office of the Company in the Merchant's Exchange Building, and that he later placed these papers in the vault. On page 595 this witness states that he has not seen any of these papers pertaining to these miscellaneous lands in the office of the Company since the fire.

We submit that the above facts show that sufficient search was made under the circumstances.

The fact that this agreement was executed so

many years ago and that many of the reasons for its ever having been executed have no doubt long since ceased to exist, and the further fact that no one of the heirs of Ben Holladay have, during all of these years, made any claim to these lands, are circumstances which would not call for any great degree of care in the preservation of such an instrument. Hence no extreme degree of diligence is required in making a search for this agreement.

> "Where a document or writing is not required to be kept in some particular place, but where it is made to appear that it was last seen or known to be kept at a particular place, then it should be shown that a careful search was made where it was last known to be or where it was most likely to be found."
>
> McDonald v. Stack, 176 Ill. 456
> Elliott on Evidence, Sec. 1466, Vol. 2.
> Watson v. Richardson, 110 Ia. 673

In the case last above cited the Court said:

> "Parole evidence as to the contents of a written contract is admissible where it is shown that it cannot be found among the papers of the person entitled to its possession."

It was unnecessary to do more than show that the document was at one time in the possession of the company or its officer in charge, that a reasonably careful search has been made by the custodian of the corporate records and files, in the place where such records and files are kept, and that the instrument in question could not be found. This lays the foundation for secondary evidence.

ARE THE PLEADINGS IN THE CASE OF JOHN NIGHTENGALE ET AL. VS. OREGON CENTRAL RAILROAD COMPANY ADMISSIBLE?

If it should appear that the matters and things set forth and contained in these pleadings or any of them, are of such a character as to amount to admissions upon the part of Ben Holladay against interest, when applied to the issues in the suit at bar, or if the facts show that Ben Holladay directed and controlled the litigation, thereby becoming a quasi party, then there is no rule of law or evidence by which they are to be excluded. There are many minor rules of evidence bearing upon the question, which, however, have no controlling force when complainant has shown,

First: That the pleadings were prepared by the direction of Ben Holladay, and that he had knowledge of the contents thereof.

Second: That he must have understood the matters and things related in such pleadings.

Third: That it would have been natural for him to have denied such matters if against his interest.

Fourth: That he had at the time those pleadings were prepared, adequate knowledge of the matters and things so related, as to have put him upon notice of the fact that the agreement of March 28, 1870, was thereto attached, and that his attorneys formally stipulated that the copy of the purported

agreement of March 28th, 1870, was a live copy of the original.

It is the purpose of complainant to show from the contents of these pleadings in connection with other circumstances, that Ben Holladay was thoroughly familiar with all of the facts, and that he was the person who directed the preparation of the Oregon Central Railroad Company and Oregon & California Railroad Company's answer to the bill of complaint therein. In the first place, an examination of the bill of complaint shows that while it is a suit against the Oregon Central Railroad Company and the Oregon & California Railroad Company, that it is also a general charge of fraud directed against Ben Holladay personally, stating that it was a deliberate plan of Ben Holladay to defraud the complainants out of certain interests they claimed to have had in the Oregon Central Railroad Company.

In order to fully understand that the matters and things set forth in these pleadings (Exhibits 51, 52, 53, 54 and 61-A, B, C) (see pages 1451, 1475, 1508, 1516 transcript, Vol. III), amount to admissions upon the part of Ben Holladay that the agreement of March 28, 1870, (the last agreement) was a reality and had been duly executed and acted upon, it will be necessary to examine the issues raised by the pleadings in said suit, to show their connection and relation to this lost agreement. (Being referred to in the suit entitled John Night-

engale et al. v. Oregon Central R. R. Co. et al., as Exhibit "G").

In the bill of complaint of said Nightengale et al. v. Oregon Central R. R. Co. et al. paragraph III, it is alleged as follows:

"That on or about the 7th day of September, 1869, without any consideration having been paid therefor, the said Oregon Central Railroad Co., by its, their directors, who *were the tools and confederates of Ben Holladay*, and who in all things pertaining thereto did his bidding, caused to be issued, nominally to said Ben Holladay, in the name of Ben Holladay & Co., 39,930 shares of its capital stock; that prior to the last mentioned day the said capital stock so as aforesaid issued to said A. J. Cook & Co. and held and controlled and owned by your orator, Elliott, was delivered to and duly transferred on the books of the corporation of the said Oregon Central Railroad Company, to the firm of Ben Holladay & Co., then composed of Benjamin Holladay, C. Temple Emmet, and your orator, Elliott, and the same was on said last mentioned day, and ever since has continued to be in the actual possession of Benjamin Holladay as the representative of and assuming to act in reference thereto, in the name of Ben Holladay & Co., composed of the individuals hereinbefore mentioned."

In subsequent paragraphs it is alleged that Ben Holladay organized the Oregon & California Railroad Company (see pages 174, 175 Exhibit 7, pages

406-407 of transcript, Vol. II) and had caused such company to absorb the Oregon Central Railroad Co., and in so doing, and as a part of Ben Holladay's fraudulent scheme, caused the dissolution of the Oregon Central Railroad Co., and caused all of its stock to be cancelled. (See paragraphs 13 and 14 of said bill of complaint, Exhibit 54, pages 1527-1528 of transcript, Vol. III).

As to further allegations charging fraud to Ben Holladay, see paragraphs 8, 9, 10 and 11 of said bill of complaint. (pages 1523-1524-1525 and 1526 of transcript, Vol. III).

In paragraph 22 (page 1533 of transcript, Vol. III) it is again generally alleged that Ben Holladay has uniformly and at all times controlled and shaped and determined the policy of the Oregon & California Railroad Co.

From these allegations directed against Ben Holladay personally, charging him with fraud and general bad faith and numerous irregularities, it is only natural to expect that when the answer of said Oregon Central Railroad Co. and said Oregon & California Railroad Co. was prepared, that he would be consulted. That he was so consulted, and that it was he who in fact directed the preparation of said answer and signed the same is made manifest when it is read in connection with Exhibit 7, pages 160 to 208. (pages 380 to 440 of transcript, Vol. I). We have already shown that it was the

mind of Ben Holladay who directed the various business transactions therein recorded.

An examination of the answer of the Oregon Central Railroad Company and the Oregon & California Railroad Co., in the suit of John Nightengale et al. against said companies, shows that the firm of Ben Holladay & Co. surrendered and delivered up to the Oregon Central Railroad Co. all of the property acquired in connection with the building of the Oregon Central railroad. (See pages 26 and 27, Exhibit 61-A, (pages 1581 and 1582 of transcript, Vol. III), where it is alleged that Ben Holladay & Co. transferred and conveyed unto the Oregon Central Railroad Co. all property, both personal and real, of every name and description, then owned by or standing in the name of Ben Holladay & Co., in Oregon, or in their possession and intended for use in and to be used in the construction of the said railroad.) *Here we have a direct allegation to the effect that this agreement of March* 28, 1870, *was executed by Ben Holladay, and by Ben Holladay & Co.* It would be impossible to believe that Ben Holladay did not have any knowledge of the fact that this agreement of date March 28, 1870, was a part of the answer of the Oregon Central Railroad Co., and the Oregon & California Railroad Co. in said suit, and that he did not fully understand its purport, especially as it also appears on page 28 of the answer immediately following, that a copy of it is marked Exhibit "G"

and made a part of the said answer. (See page 1583 of transcript, Vol. III)

This brings us to the main point by which complainant claims the connection and relation which said agreement signed by Ben Holladay & Co. on March 28, 1870, has to the issues in the suit between John Nightengale et al., and the Oregon Central Railroad Co. et al. Complainants John Nightengale and S. G. Elliott were endeavoring to recover certain stocks which they claimed had become their property by reason of their connection with the firm of A. J. Cook & Co., who had received two million dollars in capital stock of the Oregon Central Railroad Co. in part consideration for their promises and undertakings set forth in the agreement of A. J. Cook & Co. to construct a railroad for the Oregon Central Railroad Co. (See Exhibit 21, page 4, page 1160 of transcript, Vol. III).

In order to show that any claims which these complainants were asserting in this suit against the Oregon Central Railroad Co. and the Oregon & California Railroad Co., were barred, it was the purpose of Ben Holladay and the defendants named in said suit, to show that the firm of Ben Holladay & Co., which had become the successor of the firm of A. J. Cook & Co. had, *by the agreement of March 28, 1870, conveyed all of the property of every kind and description then belonging to the firm of Ben Holladay & Co., unto the Oregon Central Railroad Co.*, and in addition thereto had surren-

dered all of the stock of the Oregon Central Railroad Co. then in their possession. It is to be borne in mind at this point that the railroad of the Oregon Central Railroad Company was not completed as per the terms of the original contract with A. J. Cook & Co., and that A. J. Cook & Co. had done very little work in connection therewith up to the time Ben Holladay & Co. assumed such contract. That in consideration of such transfer the Oregon Central Railroad Co. was to pay unto Ben Holladay & Co. the sum of $800,000. (See pages 164-165, Exhibit 7; also pages 410-411 and 412 of transcript, Vol. I). This brings out very clearly the importance of making this agreement of March 28, 1870, (the lost agreement), an exhibit in said Nightengale suit. The important question, however, is, did Ben Holladay see this agreement, and did he know and realize that it was an agreement which in general terms agreed to convey unto the Oregon Central Railroad Co. all of the real estate in the State of Oregon belonging to the parties who signed same,—which agreement contains the following clause: "It being the intention of this conveyance to transfer to the said Oregon Central Railroad Co. all property, real and personal, of every name and nature, now owned or possessed by the undersigned, in the State of Oregon." (See pages 175, 176, Exhibit 7; also pages 408 and 409 of transcript, Vol. I).

On page 28 (see page 1583 of transcript, Vol.

III) of the answer to the bill of complaint in the said suit, (See Exhibit 53) it is admitted that this agreement of March 28, 1870, is made a part of said answer. This answer was signed by the Oregon Central Railroad Co., by Ben Holladay, as President. It also appears that at the time this answer was prepared, that Ben Holladay was a holder of a majority of the stock of the Oregon & California Railroad Co., and that he was in control of its affairs. (See page 1 of affidavit, Exhibit 53; also page 1476 of transcript, Vol. III).

Keeping in mind the matters just referred to, and considering certain parts of the affidavit of Ben Holladay (Exhibit 52) on file in the same suit, it becomes very evident that it was he who supplied the facts of the said answer. A reading of this affidavit discloses, as has been contended heretofore, that Ben Holladay was at the bottom of each and every transaction recorded upon pages 160 to 208 of the minute book (Exhibit 7, pages 380 to 440 of transcript, Vol. I). This affidavit rehearses a great many matters which appear upon said pages, which are also referred to in the bill of complaint and answer. (Exhibits 54, and 61-a, pages 1516 and 1548 of transcript, Vol. III). These matters are so closely connected with the lost agreement signed by Ben Holladay & Co. as to be inseparable. Indeed, Ben Holladay personally relies upon and causes the agreement of March 28, 1870,

to be pleaded as a part of the defense against the charge of fraud made against him.

On pages 1, 2 and 3 of this affidavit he makes statements showing that he had knowledge of the preliminary matters preceding the signing of the said lost agreement of date March 28, 1870, pages 1475-1477 transcript, Vol. III. On page 4, (page 1480 transcript, Vol. III) he makes special reference to the meeting of the stockholders of the Oregon Central Railroad Co. held on March 28, 1870, at which the said lost agreement was signed by Ben Holladay & Co., and on pages 7, 8, 10, and 21, (pages 1485-1488 transcript, Vol. III) this same meeting is again referred to. On page 10 (page 1487 of transcript, Vol. III) in connection with the statement of other matters which occurred upon the 28th and 29th days of March, 1870, he states that the deed which was executed by the Oregon Central Railroad Co. conveying its property of every kind unto the Oregon & California Railroad Co., was referred to and made a part of his affidavit. Numerous recitals contained in this deed of March 29, 1870, from the Oregon Central Railroad Co. to the Oregon & California Railroad Co. directly bear upon the signing of the said lost agreement, and preclude the conclusion that Ben Holladay did not know and fully understand that the said lost agreement mentioned did not agree to convey unto the Oregon Central Railroad Co. all of the real property in the State of Oregon belonging to Ben Holla-

day & Co., on that date, and that the lands in dispute here were a part thereof. If there be any doubt that he did not so understand, a reading of the affidavit will readily remove it.

These circumstances clearly show that as to the defendant in the suit at bar, the pleadings in the suit of John Nightengale et al. v. Oregon Central Railroad Co. et al., may be received in evidence as admissions against interest. Ben Holladay could not himself dispute his own admissions, then made. His devisee and heir, is equally bound.

ADMISSIONS, GENERALLY.

An admission may be defined as a statement or act which amounts to an affirmance of some fact material to the issues, where such affirmance would be against the interest of the party making it.

McKelvey on Evidence, Sec. 90.

This principle may be applied to the facts just above related. When Ben Holladay in his affidavit stated that a copy of the deed from the Oregon Central Railroad Co. to the Oregon & California Railroad Co. was made a part of such affidavit, he thereby affirmed that the Oregon Central Railroad Co. was conveying unto the Oregon & California Railroad Co. all the real property in the State of Oregon that had theretofore been conveyed unto the Oregon Central Railroad Co. by Ben Holladay & Co., on the 28th day of March, 1870. This has

been clearly pointed out heretofore. (See pages 1486 and 1487 of transcript, Vol. III).

An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant, or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding.

Stephen's Digest, Article XV.

On pages 956 of Volume XVI CYC, the following general rule is stated:

A statement made in the presence of a party, but not connected with his conduct at the time when it was made, is mere hearsay, and not evidence against him of any fact narrated in such statement; but where a definite statement of a matter of fact is made in the presence or hearing of a party, so that he understands it, in regard to facts affecting *him* or *his rights*, and the statement is of such a nature as to call for a reply, and the party addressed is possessed of knowledge concerning the matter referred to, enabling him to reply if inclined to do so; and the nature of the statement, the right to information of the person who makes it, or other circumstances, are such as to render a reply proper and natural, the statement, in connection with a total or partial failure to reply, is admissible evidence tending to show a concession of the truth of the facts stated.

"And the general doctrine is that the declarations of a party to the record, *or of one*

> *identified in interest* with him, are as against such party, admissible in evidence. The law in regard to this source of evidence looks chiefly to *the real parties in interest*, and gives to their admissions the same weight as though they were parties to the record."
>
> Greenleaf on Evidence, Secs. 171-180, Vol. I, 15th Ed.
>
> Fickett v. Swift, 41 Me. 65, 68

A reading of Ben Holladay's affidavit, especially the parts hereinbefore particularly referred to, removes all doubt as to his being identified with matters and things contained in the pleadings in the suit entitled "John Nightengale et al. v. Oregon Central Railroad Co. et al.", and that he was the principal party in interest.

It cannot be seriously argued that Ben Holladay's affidavit is not admissible, as a reading of it in connection with the answer filed in the said suit, will show that it contains many admissions against interest, which are material to the issues in the present case.

> "The affidavits and depositions of a party are of course competent to show his admissions, although used in another suit, *and from their solemn character are entitled to great weight.*
>
> Jones on Evidence, Sec. 274, Pocket Ed. and cases cited, note 72

Respondent being in privity with Ben Holladay, she is barred by these admissions.

"A declaration emanating from the claimant of any right or estate, which afterwards comes to the parties on the record by descent or purchase, affecting adversely the estate acquired, may be given in evidence against the party to the record who claims the estate."

Gaines v. Rief, 12 Howard, (U. S.) 472, 531
Dodge v. Freemans Savings Bank, 92 U. S. 379

"Admissions made by a grantor before he parted with the legal title being contrary to his interest, are competent evidence against him, and those claiming under him."

Bowen v. Chase, 98 U. S. 254, 262, 263
Baker v. Humphrey, 101 U. S. 494, 499

THE GENERAL RULE AS TO ADMISSIONS IN OTHER SUITS.

"Where one is not a party to the suit, nor in privity with one who is a party, and *not interested in the issue either personally or in a representative capacity, his declarations or admissions* are not as a general rule admissible in evidence."

Ency. of U. S. Supreme Court Reports, Vol. 5, p. 228, Sec. 13, note 77

This concise statement of the general rule contains the general exception, and clearly sustains appellant's contention that the pleadings in the John Nightengale et al. v. Oregon Central Railroad Co. et al., suit are admissible against the defendant.

"If a person have peculiar means of knowl-

edge of a fact, and makes a declaration of that fact which is against his interest, it is evidence against him after his death, if he could have been examined to it in his lifetime."

Ency. of U. S. Sup. Court Reports, Vol. 2, page 229, Sec. 2, note 81

These general principles are in harmony with complainant's theory that the facts and circumstances just related are of such a character as to have called for a denial from Ben Holladay if the agreement of March 28, 1870, was not intended as an agreement to convey the lands in dispute herein, unto the Oregon Central Railroad Co. He not only did not deny such fact, but defended his action and the action of his company upon the ground, among others, that the agreement of March 28, 1870, was a bona fide, valid contract, the consideration for which he had received.

PROOF OF LOSS OF AGREEMENT OF MARCH 28, 1870, SIGNED BY BEN HOLLADAY & CO. AND BEN HOLLADAY.

After having shown that the agreement of March 28, 1870, was signed and delivered by the firm of Ben Holladay & Co. unto the Oregon Central Railroad Co. on said date, as alleged in paragraph 8 of complainant's bill of complaint, it is now incumbent upon complainant to show that the original of this agreement is not now in the possession of complainant, and that its whereabouts is un-

known, and that it has in all probability been lost or destroyed.

As stated by an eminent author on the law of evidence, (See Sec. 1451, Elliott on Evidence, Vol. 2).

> "The variety of facts and circumstances attending each different case renders impossible, or at least impracticable, the statement of a rule that may fit in all cases. * * * Each case depends more or less upon its own peculiar circumstances, and these circumstances must suggest the extent and thoroughness of the search. * * * As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, the party seeking to introduce the secondary evidence need not, on ordinary occasions, make a search for the original document as for stolen goods, nor need he be in a position to negative every possibility of its having been kept back."
>
> Citing Christy v. Kavanagh, 45 Mo. 375

It may, however, be premised, that, if we have shown that Ben Holladay admitted or acted upon, the copy set out in the corporate records, or in the Nightingale suit as and in lieu of the original, and thereby admitted the execution of the original, it is legally unnecessary to otherwise prove its execution, or account for its loss.

The general rule as to the sufficiency of the proof of loss of an instrument to admit secondary evidence is also stated by this same author, as follows:

> "The object of the rule requiring strict proof

of loss and diligence of search, is to prevent a party to the action from perpetrating a fraud on his adversary by withholding the documents and writings, which, if produced, would not support his contention and would reveal the fraudulent design."

See also Wigmore on Evidence, Section 1192.

To the same effect is Section 558 of Volume I of Greenleaf on Evidence, where this author says:

"But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

"It should be recollected, that the object of the proof is merely to establish a reasonable presumption of loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge. If the paper was supposed to be of little value, *or is ancient*, a less degree of diligence will be demanded, as it will be aided by the presumption of loss of which these circumstances afford. If it belonged to the custody of certain persons, or is proved or may be presumed to have been in their possession, they must, in general, be called and sworn to account for it, if they are within reach of the process of the court."

There are certain facts in the record which, when tested by the above rule, will sufficiently overcome the defendant's contention that no foundation has been laid for the introduction of secondary evi-

dence showing the existence of this agreement of March 28, 1870. That this agreement is not now in the possession of the Oregon & California Railroad Co., and that it has no doubt been lost or destroyed, is evidenced by the testimony of the following witnesses:

First: Luther F. Steele testified that he was custodian of the records of the Oregon & California Railroad Co. under Mr. W. W. Cotton, who was secretary of said company. (See pages 466-467 of transcript) and (on page 851 of transcript, Vol. II), that he had made a search through the records of the office of the secretary, where any such documents would be likely to be found; that he had been unable to find it. He also stated that he had never seen it. On said pages 466 and 467, he further states that he had been custodian of the records of the Oregon & California Railroad Co., under Mr. Cotton, since 1905. If this agreement had been among the records of the complainant, it no doubt would have been seen by this witness, as it was his particular duty to look after documents of this character and keep a record thereof.

Second: B. A. McAllaster, a witness called by the complainant, stated that he was Land Commissioner for the Oregon & California Railroad Co., and that his duties were in part to look after the miscellaneous lands, payment of taxes, and straightening up of the records pertaining thereto. On being asked if he had made a search for this agreement,

he stated: "I have had the files and storage vaults at our office thoroughly searched, time and again, for all of these documents, without being able to find them." (See page 773 of transcript, Vol II).

Third: C. W. Eberlein, a witness called on behalf of the defendant, testified (relative to this lost agreement) in substance that he was appointed Land Agent for the Oregon & California Railroad Co. in 1903; that his duties were the straightening up of all land matters, and that he had made a list of all the lands of the company. (See pages 803-804 of transcript, Vol. II), and that he did not recall ever having seen this agreement. This witness was shown a copy of the said lost agreement, as appears upon pages 175, 186 of Record. (See pages 828 and 829 of transcript, Vol. II).

Fourth: Henry Conlin, a witness called by complainant, stated that he was Acting Land Agent from June, 1908, until September, 1908, and that he had been since 1905, prior thereto, in the employ of the Oregon & California Railroad Co. in a clerical capacity. (See pages 909 to 910 of transcript, Vol. II). On pages 915 and 916 this witness states that he had never seen nor heard of any such document until he saw it set out in the bill of complaint.

If this agreement had not been lost or destroyed, and was in the possession of the complainant, it would not have escaped the attention of all the

above named witnesses, especially that of Mr. Luther F. Steele, who stated that he had made a particular search for this instrument, and that it was his particular duty to look after such documents.

On pages 607 to 611 of the transcript, Vol. I, there is set out a copy of Complainant's Exhibit 16, which is a list of numerous documents and packages of papers which were delivered to W. W. Cotton, Secretary of the Oregon & California Railroad Co. by George H. Andrews, his predecessor. On pages 604 and 605 of the transcript, Vol. II (testimony of Luther F. Steele) it appears from a memorandum made by Miss Luckey, Mr. Cotton's private secretary, dated March 13, 1905, that all of these documents, packages of papers, etc., were delivered to J. N. Willicut, who was Secretary of the leased lines of the Southern Pacific Company, and which included the Oregon & California Railroad Co. (See page 605 of transcript, Vol. I). A search was made by Mr. Steel for the receipt of Mr. Willicut, but it could not be found. (See pages 728 to 732 of transcript, Vol. II). He did, however, find a receipt from Wells-Fargo Express Co. showing that eight boxes of books and records were shipped to San Francisco on March 13, 1905, to Mr. Willicut, as is stated in the memorandum made by Miss Luckey.

It further appears from Mr. Steele's testimony, and from Exhibit 16 (pages 602 to 611 of transcript, Vol. II), that the deeds from Grindley and

Gardner Elliott to Ben Holladay & Co. appear to have been among the papers and other documents sent to Mr. Willicut on March 13, 1905. (See Nos. 26 and 31 of this list, pages 608 and 609 of transcript, Vol. II). In addition to the various papers and documents enumerated in the list of papers delivered to Mr. W. W. Cotton by Mr. Andrews, and as appears to have been sent to Mr. Willicut, as above stated, it is also stated, page 34, page 610 of transcript, Vol. II, that box No. 4 contains, among other items, one package of numerous papers, also one tin box, key to which is lost, contents unknown; that it was filed in box No. 4, and marked OCRR Co., Secretary's records. This fact, considered in connection with the fact that the deeds from Grindley and Elliott, Nos. 26 and 31, (See pages 608 and 609 of transcript Vol. II) were listed in this Schedule of deeds transmitted to W. W. Cotton by George H. Andrews,—all of which appear to have been sent to Mr. Willicut by Mr. Cotton—are together a combination of circumstances from which an inference may be drawn that the agreement of March 28, 1870, the alleged lost agreement (being so closely related in point of time, and to Ben Holladay's dealings with the Oregon Central Railroad Co.) was in this box, and that it was sent to Mr. Willicut at San Francisco, on the 13th day of March, 1905.

The complainant's position is that this instrument of date March 28, 1870, was, no doubt, de-

stroyed in the great fire and conflagration which occurred at San Francisco, in April, 1906. From the testimony of W. D. Kelley, who was an employee of the Land Department of the Oregon & California Railroad Co., it appears that a great many instruments and records of the company pertaining to miscellaneous lands, were destroyed. (See pages 751 to 757 of the transcript, Vol. II) that Mr. Kelley's position was such that he would have access to records pertaining to miscellaneous lands. (See testimony of C. W. Eberlein, pages 903 to 908 of transcript, Vol. II); also pages 752 and 753 of Record, where the witness, Kelley, shows personal knowledge as to the location of various papers pertaining to the miscellaneous lands of the company prior to the fire; also that he had knowledge of the contents of the vault wherein these documents were kept, soon after the fire, and that Mr. Henry Conlin assisted in an attempt to save various papers, etc., which were kept in this vault.) (See page 757 of transcript, Vol. II).

On pages 752 and 753 of transcript, Vol. II, Mr. Kelley stated in substance that a great many deeds and other papers, including those which had been received from Mr. Eberlein (see Exhibit 9, pages 474 to 488 of transcript, Vol. I), were at the time of the fire, in the office of the Oregon & California Railroad Co. Land Department, in the Merchants Exchange Building, San Francisco.

In view of the rules just above stated relative

to the proof necessary to establish the loss of the instrument, it would be difficult to determine what other proof could be asked for, in addition to the testimony of the above named witnesses. The whole theory upon which the law relative to the proof of the contents of lost documents is based, is that there is great danger of fraud being practised, and that valuable rights might be wrongfully acquired if great care were not exercised in admitting secondary evidence to prove the existence of such documents. In short, it is the purpose of the court in such matters to detect any fraudulent schemes which might be planned by a person claiming rights by reason of the alleged prior existence of some writing.

In the present case it would be difficult to decide upon what theory the defendant could ask the court to conclude that there was any attempt to perpetrate a fraud upon the defendant. There has not been one single act or circumstance related which would be ground for the slightest suspicion as to the due existence, execution, and delivery of this agreement by Ben Holladay and Ben Holladay & Co. on March 28, 1870. The only circumstance to which defendant can refer as being the basis for any suspicion or doubt as to the existence of such agreement, is that the original could not be produced. That the copies in the record are genuine has been clearly demonstrated, and the court certainly would not be justified in concluding that no

such agreement ever existed, in view of the fact that the defendant has not even attempted to prove that the copies so introduced were not all that they purported to be. In the absence of any showing being made by defendant that there was any fraud connected with the preparation or production of the copies of this agreement of March 28, 1870, or in the production of any other secondary evidence, the search made for such agreement has been more than would ordinarily be required.

> "The search for a lost instrument is governed by the circumstances of the case. If suspicion hangs over the instrument, or it appears that it is designingly withheld, a more rigid inquiry should be made into the reason for its non-production. Where no such suspicion exists, all that ought to be required is reasonable diligence to obtain the original."

Minor v. Tillotson, 7 Peters (U. S.) 99

See also

Mandewitte v. Reynolds, 68 N. Y. 579

V.

WERE THESE LANDS PURCHASED BY BEN HOLLADAY & CO., A CO-PARTNERSHIP?

Considerable importance has been attached to the necessity of complainant making some showing that these lands in controversy were purchased by Ben Holladay & Co. as a co-partnership. We submit, however, that it has been clearly and sufficiently shown that they were so purchased. Certain facts have been heretofore related to show that these lands were purchased primarily for the use and benefit of that firm and for use in the construction of the Oregon Central Railroad, and to aid in establishing such fact, complainant incidentally proved that they were purchased by Ben Holladay & Co., a co-partnership, which, as has been shown, was formed for no other purpose than for the building of the Oregon Central Railroad. No time will be taken up in rehearsing these facts hereinbefore referred to, which leaves no room for doubt that the Grindley and Elliott tracts were purchased by Ben Holladay & Co., and that Ben Holladay & Co. in turn agreed to convey them to the Oregon Central Railroad Co.

There seems to be no dispute that whatever interest Ben Holladay personally had in such lands on the 28th day of March, 1870, whether it be all or a part thereof, was in equity agreed to be conveyed to the Oregon Central Railroad Co.

"A conveyance of real property which is the property of a partnership conveys all the interest

of the member of such partnership who signs the conveyance."

Robinson Bank v. Miller, 153 Ill. 244

"A deed made to a partnership in the firm name, without naming as grantees the individual partners, *is good in equity*, and, by implication, vests in the members of the firm the power to convey; and hence such deed is admissible as a muniment of title, in favor of one who claims title to the land in question through the grantee of such partnership."

Dunlap et al. v. Green, 60 Fed. 242

"The *legal title* to real estate can never vest in a partnership as such, but is in the partners as tenants in common. Upon the dissolution of an insolvent partnership, however, by the death of one of the partners, the survivor may convey such an equitable interest in the entire property as will enable his vendee to compel a conveyance by the heirs of the deceased partner of the legal title to the interest of their decedent."

Bank of Southwestern Georgia et al. v. McGarah, 120 Ga. 944

If the legal title vested in the members of the firm of Ben Holladay & Co., it vested in Ben Holladay, C. Temple Emmet and S. G. Elliott, and the contract of March 28, 1870, signed by Ben Holladay & Co. and Ben Holladay, equitably bound the firm, and legally bound Holladay. The defendant can claim no interest excepting through *Ben Holladay*.

VI.

ADVERSE POSSESSION.

If it be the opinion of the court that complainant has not shown that it is now the holder of the equitable title to the lands in question, from what has been hereinbefore stated, or for any other reason, then the complainant contends that it is still entitled to prevail in this suit as against defendant, by reason of the fact that it and its predecessors in interest have since the 28th day of March, 1870, been in possession of the lands continuously, openly, notoriously, and adverse to the claim of defendant, under color and claim of title.

Before discussing the various acts upon which complainant relies as giving it title to the lands in question by adverse possession, the court will be asked to consider that at the time complainant went into possession of these lands under the agreement of March 28, 1870, from the Oregon Central Railroad Co., and for several years thereafter, they were of very little value; that their value at the time they were purchased, to-wit, March 28, 1870, was based primarily upon the value of the timber thereon, and that after the timber was removed they would be of so little value that complainant would not have been justified in making any permanent improvements, and that the possession taken was such as their value, uses and purposes justified.

ACTS EVIDENCING OWNERSHIP AND POSSESSION.

PAYMENT OF TAXES:

The taxes on these lands have been paid by the Oregon & California Railroad Co. since the year 1873, to 1910 inclusive. This is evidenced by the testimony of a number of witnesses for complainant, as well as by documentary evidence. The first witness called by complainant who testified upon this question, was Mr. R. B. Halleck, who testified that he had been employed in the Tax Department of the Oregon & California Railroad Co. since 1895, under J. W. Morrow, Tax and Right of Way Agent; that his duty was to check up and certify to the various tax files and vouchers; that in this way he had become acquainted with the various lands upon which the company had paid taxes. (See pages 212 to 220 of transcript, Vol. I). That in the spring of each year it was the custom of the company to compile a list of all the property owned by it in the various counties, and send same to the County Assessor, and that when it had been determined what each parcel of land had been assessed at by the various County Assessors, it was his duty to revise the figures and check them up against the tax roll; that he had examined the records of Clackamas County as to assessments made against the lands in question here; that he assisted Mr. Hanselman, of the Tax Department, in Mr. Morrow's office, and the County Clerk of Clackamas County

(Mr. Mulvey) in checking up and preparing a copy of the tax records of said county, showing what lands were assessed to the Oregon & California Railroad Co. and upon what lands taxes had been paid by said company. (See Complainant's Exhibit 6, which is a statement of the tax roll of Clackamas County, certified to as such by Mr. Mulvey).

On page 216 of transcript, Vol. I, this witness states that he has personal knowledge of the payment of taxes since the year 1908.

Mr. Halleck's testimony relative to preparation of Complainant's Exhibit 6 is corroborated by Mr. Hanselman, who testified that he was a clerk in the Tax & Right of Way Department of the Oregon & California Railroad Co. (See pages 443 to 445 of transcript, Vol. I; also testimony of W. L. Mulvey, County Clerk of Clackamas County, pages 777 to 802 of transcript, Vol. II, showing that the taxes were paid each year beginning with the year 1873 to 1910, by the Oregon & California Railroad Co., with the exception of the year 1877; see also testimony of B. A. McAllaster, pages 764 and 765 of transcript, Vol. II.

It appears from Complainant's Exhibit 67 that for some years vouchers have been made out by the Oregon & California Land Co. in payment of taxes. On pages 767 and 768 of the transcript, Vol. II, it is explained by the testimony of B. A. McAllaster that this would not indicate that the taxes were not paid

by the Oregon & California Railroad Co., for the reason that the Oregon & California Land Co. was simply a holding company for the Oregon & California Railroad Co. (See Exhibits 62, 63, 64, 65, 66, which are original tax receipts for the taxes paid on the lands in question, for the years 1906 to 1910).

MISCELLANEOUS ACTS OF OWNERSHIP.

There is some evidence introduced tending to show that these lands were fenced some time in the early seventies, and prior to 1905, when they were enclosed by the Anchor Fence Co. under contract with the Oregon & California Railroad Co. Edward S. Elliott (see page 181 of transcript, Vol. I), states that in 1868 or 1869, there were indications of an old fence. David Loring, civil engineer, stated that he and Mr. Andrews went upon the lands some time in 1894, and noticed a fence on the East boundary, running north and south. (See pages 132 and 133 of transcript, Vol. I). He stated further that he went upon these lands a few days prior to giving testimony, at the request of Mr. Fenton, and found two fences which joined at the northeast corner of the Grindley tract, one of which was a barbed wire fence, and had been built within recent years; and another a board fence which had been in existence for a great many years. Also saw evidence of old fence on other boundary lines

of these same tracts. (See pages 134 to 136 of transcript, Vol. I).

On page 157 of the transcript, Vol. I, Mr. N. E. Britt testified that he was caretaker of these lands, and that in 1889 or 1900, he recalled seeing an old fence on the east boundary line of the Elliott tract.

Samuel E. Wishard stated that during the time these lands were being used by Ben Holladay & Co. for mill sites, he was foreman at the shops of the Oregon Central Railroad Co. (page 119 of transcript, Vol. I). He further stated that he made a recent investigation, and saw evidence of old fences. (See page 120 of transcript, Vol. I).

Sidney Smyth, another witness called for the complainant, stated that he was upon the land in *1894*, for the purpose of making a survey, and at this time he saw old fences, especially on the north line. (See pages 457 and 458 of transcript, Vol. I).

From the statements of these witnesses it appears that these lands were fenced prior to the year 1905.

Quoting further from the testimony of Mr. Sidney Smyth, it appears that in 1890, to 1894, he was County Surveyor for the County of Clackamas; that in 1894 he made a survey of this land at the request of Mr. George H. Andrews, who was at that time Acting Land Agent of the Oregon & California Railroad Co. (See page 456 of transcript,

Vol. I.) That he was paid for such work by the Oregon & California Railroad Co. (See page 458 of transcript, Vol. I). He further stated that at the request of Mr. Fenton he went upon the land a few days prior to giving testimony, and located the iron pipes evidencing this survey of 1894. (See pages 456-457 of transcript, Vol. I).

On pages 686 and 687 of transcript, Vol. II, Mr. Koehler stated that in the early seventies he was in charge of the lands of the Oregon & California Railroad Co., and that at this time he remembers having seen a plat of these lands in the offices of the company, and that they were of record as being part of its property. (See pages 705 and 706 of transcript, Vol. II.) He further states that in 1890, 1899 or 1900, he went upon the lands for the purpose of securing wood for locomotive purposes. (See page 709 of transcript, Vol. II) and that some time prior to the year 1900 he recalls having sold gravel from these lands to the County of Clackamas. (See pages 710 and 711 of transcript, Vol. II.) That wood and gravel were sold by the company from these lands, see testimony of A. N. Wills, pages 205 and 206 of transcript, Vol. II; also testimony of Con E. Battin, one of defendant's witnesses, who stated that he recalled that wood had been sold by the Oregon & California Railroad Co. from these lands; also that they had sold gravel to the County of Clackamas. (See page 953 of trans-

cript; also testimony of Orrin A. Battin to the same effect, page 971 of transcript, Vol. II)

From the testimony of N. E. Britt it appears that he was employed by the Oregon & California Railroad Co. about the year 1888, and continued in its employ until about 1905, 1906 or 1907; that his duties were to look after miscellaneous lands, and that he was connected with the land department. (See pages 153 and 154 of transcript, Vol. I).

He made inspection of these lands in question at various times, to see that there were no trespassers upon same. (See pages 154 and 155 of transcript, Vol. I). He also states that he was under the supervision of Mr. George H. Andrews, who was Land Agent at the time; that he always understood that these lands belonged to the Oregon & California Railroad Co., and never heard of anyone making any claim to them. (See pages 162 and 163 of transcript, Vol. I).

Mr. C. W. Eberlein testified that during his connection with the Oregon & California Railroad Co. he always understood that these lands were the property of the company. (See pages 811 and 812 of transcript, Vol. II). To the same effect, see testimony of Orrin A. Battin, one of the defendant's witnesses, pages 970-971 of transcript).

RECEIVERSHIP PROCEEDINGS.

That the Oregon & California Railroad Co. has been recognized as the owner of these lands, and has had possession of the same, is evidenced by the record in the case of Lawrence Harrison et al vs. Oregon and California Railroad Company et al. In this suit R. Koehler was appointed Receiver of the properties of the Company. (See pages 725 and 726 of transcript Vol. II) As such Receiver he took possession of all the property of the company, and filed a report which contains a schedule designated as "L", which was a list of the miscellaneous lands owned by the Oregon & California Railroad Co. This list includes the lands in controversy here. (See Complainant's Exhibit 10, which is a certified copy of the order appointing R. Koehler as Receiver, and which was certified to by G. H. Marsh, Clerk of the United States Circuit Court, and was identified by him at the time produced. (See pages 669, 670 and 671 of transcript Vol. II;) (also pertaining to the same proceedings, see Exhibits 11 and 12 see pages 670-671 of transcript Vol. II)

There was evidence introduced to show that these lands were fenced in 1905 by the Anchor Fence Co. Considerable importance is given to this incident by counsel for the defendant. He contends that these fences were built for and on behalf of the Oregon & California Land Company. An examination of Exhibit 45, pages 1380 to 1384

of transcript Vol. III which is the correspondence relative to the building of this fence, shows that the fence was built by the Anchor Fence Co. and was paid for by the Oregon & California Railroad Co., and that it was in fact built at their request.

From the testimony of B. A. McAllister it appears that the Oregon & California Land Company was simply a holding company for the Oregon & California Railroad Co. (See pages 767 to 768 of transcript Vol. II) For this reason this incident should not have any bearing upon the question of ownership. These lands were the property of the Oregon & California Railroad Co. at the time these fences were built, and have been so owned since March 29th, 1870, the time the Oregon Central Rail Road Company conveyed the premises to the Oregon and California Rail Road Company.

While the law relative to the acquiring of title by adverse possession seems to require some evidence of actual exclusive and continued possession, it is, like all other rules of law, controlled to some extent by the circumstances of each particular case. The character of the possession, is determined by many circumstances.

> "The evidence necessary to establish actual adverse possession varies in each particular case, much depending upon the situation of the property, and the use to which it may be applied."
>
> Bowen v. Guild, 130 Mass. 123

It is not necessary that there be evidence of occupation, cultivation, or any permanent improvement.

> "It is not the particular use made of the land, or whether built upon and used as a residence, or cleared and cultivated as a farm, but the exclusive use and adverse possession may be proven as well by other acts and declarations, which show a visible, open and exclusive possession and use of the land."
>
> Mooney v. Cooledge, 30 Ark. 655

Applying the rule just stated to the evidence relative to the location, condition, and general character of the lands in dispute, it would seem that complainant has done all that is necessary under the circumstances. There should be no harsh or technical rule of law applied to deprive the complainant of its rights to these lands, simply because it has seen fit to hold them until such time as they could be disposed of to an advantage, and until such time as justified their actual enclosure.

While it is generally held that the payment of taxes alone in and of itself is not such an act of ownership as will establish title to lands by adverse possession, it is to be considered in connection with other circumstances. And long continued payment of taxes, accompanied by such general knowledge of claimed ownership in the community, such as to put the absent owner of the legal title on inquiry, is sufficient.

"Payment of taxes, together with other acts of ownership and circumstances, indicate a possession. The payment of taxes may be considered as evidence of the claim of ownership."

Greene County v. Eubanks, 80 Ala. 204
Rayner v. Lee, 20 Mich. 387
Murray v. Hudson, 65 Mich. 676
McClure v. Jones, 121 Pa. St. 151

In the suit before the court, where it is shown that complainant has paid the taxes for so many years, such fact should be given great weight as tending to establish title as against defendant, especially where it has been shown that the taxes were no doubt paid with the knowledge and consent of Ben Holladay, for the years from 1873 to 1876. (See pages — to — supra)

"Where a defendant in ejectment received a warranty deed for the land in 1859, and paid all taxes thereon from the year 1859 to 1879 inclusive, and the proofs showed that it was timber land, and was never enclosed, and that he used it every year after the date of his deed, as occasion required, in procuring therefrom rails, fire wood, posts, etc., it was held that whether the land was in possession or vacant and unoccupied, the bar of the statute was complete."

Walter v. Gibbs, 97 Ill. 118

The fact that these lands were completely enclosed in 1905 so as to make the adverse possession

beyond question, should not destroy the previous rights then vested and running.

That the various acts above enumerated are sufficient to justify the court in concluding that the complainant has established title to the lands in dispute, is held in Worthley v. Burbanks, 46 Ind. 534, where the court says:

> "Adverse possession of unproductive land is shown by the recording of deed under which the occupant claims, payment of taxes, cutting of all the valuable timber, going upon the land at intervals, claiming absolute ownership, the employment of agents in the neighborhood to look after it, and the building of a brush fence around the portion cleared, without proof of actual occupancy."
>
> "What is adverse and exclusive possession, and what is an interruption of such possession, depends very much upon the character of the land and the purpose to which it is adapted, and for which it is used. Although there may be cases in which the occupation of the true owner may be of such a nature, and so continued, that it would be the duty of the court, upon the truth of such facts being apparent, to rule as a matter of law that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous, or has been interrupted."

Stevens v. Taft, 17 Gray, 33
O'Hara v. Richardson, 46 Pa. St. 385
Groft v. Weekland, 34 Pa. St. 304

"Neither actual occupation, cultivation, or residence is necessary where the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership; that much depends upon the situation of the property, and the use to which it can be applied, or to which the owner or occupant may chose to apply it."

Mooney v. Cooledge, 30 Ark. 655

Vol. 3, Washburn on Real Property, p. 134

"It is well settled that to constitute an adverse possession there need not be a fence, a building, or other improvement made. It suffices for this purpose that visible notorious acts are exercised over the premises in controversy, for thirty years after an entry under a claim and color of title."

Ellicut v. Pearl, 10 Pet. 412

"Where acts of ownership have been done upon lands which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse entry by him for twenty-one years, such acts are evidence of an ouster of the former owner, and of an actual adverse possession against him; if the jury think that the property was not susceptible of a more strict and definite possession than had been so taken and held. Neither actual possession nor cultivation, are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement; and the continued

claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and could not exercise over property which he did not claim."

Ewing v. Burnet, 11 Pet. (U. S.) 41
Houlahan v. Mining Co., 34 Colo. 365
Proprietors of K. P. v. Springer, 4 Mass. 416

VII.

A GRANT WILL BE PRESUMED TO QUIET TITLE, WHERE THE POSSESSION HAS BEEN LONG—ACCOMPANIED WITH SUCH ACTS OF OWNERSHIP AS IS USUALLY EXERCISED BY THE OWNERS OF LAND.

The Oregon and California Railroad Company has been in possession of the lands in dispute for more than forty years, and during all of this time has openly exercised such acts of ownership over them as is ordinarily exercised by owners of land. It has paid the taxes thereon for each and every year since March 28th, 1870, with the exception of one year, and has made such permanent improvements, as are usually made upon land of the same character, similarly situated. The acts of ownership have been open and notorious, and its ownership of said lands has been a matter of common knowledge in the community where situated. All of these facts have been fully established by evidence in the record and as has just been referred

to hereinbefore when discussing Appellant's rights, acquired by adverse possession.

During the forty years preceding the commencement of the action of ejectment by the defendant on the 11th day of March 1911, neither the defendant nor any one in privity in interest with her, have ever by any act or deed indicated that they claimed these lands or any part thereof. They have not paid the taxes thereon for a single year, since the 28th day of March 1870.

> "The assessment of taxes on the property to those ancestors, and their payment of the taxes for twenty years between 1770 and 1805, and of the assessment of taxes to them or to the defendants for seventy-seven years after 1805, and the payment of the taxes by them, such assessment being required to be made, under the laws of the state, to occupants or owners of the land, are circumstances of great significance, taken in connection with their constantly asserted ownership. In Ewing v. Burnet, 11 Peters (U. S.) 41, this court speaks of the uninterrupted payment of taxes on a lot for twenty-four consecutive years, as "Powerful evidence of claim of right to the whole lot."
>
> Fletcher v. Fuller, 120 U. S. 553.

The law as to when a grant will be presumed is clearly and fairly stated in the case of Fletcher vs. Fuller just cited. The following excerpts from the opinion of the court will show the application of the

law as therein stated to the facts in the cause at bar:

Quoting from page 547—

> As said by this court in Ricard v. Williams, 7 Wheat. 59, 119, speaking by Mr. Justice Story: "A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession."

In the present case—the payment of taxes for more than forty years—in connection with the acts of dominion and ownership as openly exercised by complainant and its predecessors, are circumstances which go far in establishing a grant.

From page 549:

> "In Williams v. Donell, 2 Head. 659, 697, which was also an action of ejectment, the Supreme Court of Tennessee, speaking on the same point, said: 'It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility,

a grant might have issued. And this appearing, it may be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.' "

In the case at bar, there are many facts and circumstances presented from which in the absence of any other evidence as to complainant's title it could be safely presumed, that the possession and claim of ownership of complainant was based upon a proper conveyance—

From page 551:

"The general statement of the doctrine, as we have seen from the authorities cited, is that the presumption of a grant is indulged merely to quiet a long possession which might otherwise be disturbed by reason of the inability of the possessor to produce the muniments of title, which were actually given at the time of the acquisition of the property by him or those under whom he claims, but have been lost, or which he or they were entitled to have at that time, but had neglected to obtain, and of which the witnesses have passed away, or their recollection of the transaction has become dimmed and imperfect."

It is only fair that the presumption should be indulged in in the present cause, for the reason that it has been clearly established by the evidence—that the complainant's title is based upon a writing, the original of which cannot be found.

Upon reason, the foregoing rule should be more liberally enforced, when a state of facts are presented, as in the case now before the Court.

And—further—from page 552:

> "The presumption may, therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead. It is a matter which under proper instructions, may be left to the jury."

Nowhere does it appear in the transcript of record, by any evidence of any kind or character, that the complainant's possession has been interrupted to any extent whatsoever; nor is there any evidence that its claim of ownership has ever been disputed prior to the commencement of the said action in ejectment on the 11th day of March, 1911.

> "The presumption in such cases arises not merely from the possibilities of the loss of documents by the common accidents of time, but from the general experience of men that

> property is not usually suffered to remain for long periods in the quiet possession of any one but the true owner, and that no other person will deliberately add to the value of the property by permanent improvements."
>
> Oaksmith v. Johnston, 92 U. S. 343-345

A grant may be presumed, in a proper case, in order to quiet a title and to give to a long continued possession the quality of a rightful possession.

Chavez v. United States, 175 U. S. 552-563
Crespin v. United States, 168 U. S. 208
Hayes v. United States, 170 U. S. 637-649
Ricard v. Williams, 7 Wheaton U. S. 59
United States v. Pendell, 185 U. S. 189-199
Encyclopedia of United States Court Reports, Vol. 7, page 974.

The foregoing authorities, clearly show that the principle contended for by complainant, and as announced therein are fully established, and that they rest upon a sound basis. Justice demands that these principles be applied to the present controversy.

DEFENDANT'S CLAIM IS STALE, AND IS BARRED BY THE DOCTRINE OF LACHES.

The court will be asked to consider in connection with the evidence in the record as to complainant's acts of adverse possession, and as just above referred to, the fact that the defendant has made no showing that she or any other person claiming

under or by virtue of the residuary clause in the will of Ben Holladay, has asserted title to these lands prior to the bringing of the action in ejectment on the 11th day of March, 1911. It is necessary that some showing be made that defendant has been diligent in asserting any claim to these lands. The bringing of the action in ejectment twenty-five years after the estate of Ben Holladay has been fully settled, is not a sufficient showing.

At this point the court's attention should be called to a circumstance which no doubt has already been considered. The defendant's action in ejectment follows very closely after the discharge of Mr. Henry Conlin, who was in 1908 Acting Land Agent for the Oregon & California Railroad Company. A reading of his testimony as appears on pages 909 to 916 of the transcript, Vol. II, shows that he no doubt secured certain information while in the employ of complainant, which probably prompted him to seek out the defendant and get her sanction to the commencement of the action in ejectment on March 11, 1911. The defendant resides and then resided at Tunis, Tripoli. That Henry Conlin had more to do with the commencement of this action than any other person, is a conclusion which harmonizes with the fact that the heirs of Ben Holladay have not made any claim to these lands since the estate of Ben Holladay was administered and settled. Ben Holladay never made any claim to these lands after March 28th, 1870, and now forty-one years thereafter we find

an alive granddaughter, assisting an action at law, prosecuted by a former officer and employe of the real owner.

Equity only lends its aid to the diligent, and is reluctant to entertain the claim of persons who have slept on their rights. Equity does not favor any one, who seeks by technical rules, after the death of all who knew the facts, to recover property, the party never owned or claimed.

> "There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases the courts often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights."

Goddon v. Kimmel, 99 U. S. 201-210-225
Abraham v. Ordway, 158 U. S. 416-422-429
Penn. Mut. Life Ins. Co. v. Austin, 168 U. S. 685
Ulman v. Clark et al, 75 Fed. 868

This doctrine should be invoked by the court, against the claim of defendant.

> "The doctrine applies to suits relating to lands and to matters of account."

Norris v. Haggin, 136 U. S. 386, 34 L. Ed. 424

"A court of equity always refuses its aid to stale and antiquated demands, where no excuse is shown for not before asserting them."

Lane etc. Co. v. Locke, 150 U. S. 193, 37 L. Ed. 1049

Thorn Wire Hedge Co. v. Washburn, etc. Mfg. Co., 159 U. S. 423, 444, L. Ed. 205

The court is here reminded that there is no evidence in the record that the defendant did not have knowledge of the fact that the Oregon & California Railroad Co. was in possession of these lands, and that it was claiming title thereto, and that no reason has been stated why the defendant has not commenced her action in ejectment before.

"A suitor in equity is required to be 'prompt, eager, and ready,' in the pursuit of his rights. Diligence is an essential condition of equitable relief, and laches and negligence are always discountenanced."

Eiffert et al. v. Craps et al., 58 Fed. Rep. 470

"One who relies for the recovery of lands on a fraud 40 years old must be held guilty of laches, when it appears that the fraud might have been discovered at any time after its perpetration by the inspection of a single deed, recorded where the record of title of the land was to be looked for, and that the original purchaser under the deed has been dead 12 years, and the land devised by his will sold in partition, and resold several times."

Underwood v. Dugan, 139 U. S. Rep. 380

"K, an heir at law of one N, more than 23 years after the death of N, and the probate of his will, filed a bill against N's executors and trustees, alleging that under the will such executors and trustees had no exclusive property in or control over certain assets of the testator, and seeking distribution thereof as an intestate estate. The bill gave no reason for the delay, and charged no imposition or fraud. Held, on demurrer, that the suit was barred by plaintiff's laches."

Fuller et al. v. Montague et al., 59 Fed. Rep. 212

The court's attention is called to the fact that defendant could have discovered by an examination of the records of Clackamas County, that (adopting argument of counsel for the defense, that title to these lands did not pass by the agreement signed by Ben Holladay & Co. of date March 28, 1870) record title was still in Ben Holladay & Co., and, as counsel for defendant has tried to show by numerous authorities cited, that it was technically in the name of Ben Holladay by reason of his being the only member of such co-partnership whose name appeared in the firm name. Here again we find a total lack of evidence. This would have been the least that could have been expected of defendant or anyone claiming under the residuary clause of the will of Ben Holladay.

"The purchaser of land at an administrator's sale held notorious and exclusive possession of it nineteen years, and fifteen years af-

ter the youngest heir became of age. The heirs lived in the same neighborhood, knew their father had owned the land, and visited the purchaser's family, and were notified of the administrator's sale. The purchaser cut the timber, erected costly buildings, and contributed a large sum towards bringing an electric railway from the city to the premises, and the land rapidly increased in value. The deeds showing the transactions were of record. Held, that the heirs were guilty of laches preventing their recovery of the land, notwithstanding no notice of the appointment of the administrator was served upon them."

Loomis v. Rosenthal, 34 Or. 585

"A delay of 20 years by a daughter after her majority to assert any claim as heir to certain city lots for which her father held certificates from a townsite company, and which were conveyed to his administrator after his death, was laches, as against persons claiming under mesne conveyances from purchasers at a void administrator's sale; there being no fraud, and she having knowledge of facts sufficient to put her on inquiry leading to a knowledge of the facts which were spread upon the records of the probate court and the register of deeds, and the lots having by the growth of the city and by improvements, increased in value from $250 to $25,000.

"Counsel for the appellant invoke the principle that there can be no acquiescence and no laches where there is no knowledge, and contend that since the appellant did not know that she had any interest in these lots until 1891,

she cannot be charged with laches in asserting her rights. But ignorance which is the effect of inexcusable negligence is no excuse for laches, and knowledge of facts and circumstances which would put a person of ordinary prudence and diligence on inquiry is, in the eyes of the law, equivalent to a knowledge of all the facts which a reasonably diligent inquiry would disclose. 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient knowledge to lead him to ascertain a fact, he shall be deemed conversant with it.' "

Wood v. Carpenter, 101 U. S. 135, 141
Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 451, 13 Sup. Ct. 944
145 U. S. 317

The above is very much in point upon the questions before the court.

It has been urged by counsel for the defendant that instead of the defendant being barred by laches that it is the complainant who is presenting to the court a stale and antiquated claim, and that it should not for such reason prevail in this suit. In view of the fact that it has been shown hereinbefore that in equity the complainant acquired these lands on March 28, 1870, defendant's position cannot be sustained.

"Laches cannot be imputed to one in the peaceable possession of land under an equit-

able title, for delay in resorting to a court of equity for protection against the legal title; since possession is notice of his equitable rights and he need assert them only when he finds occasion to do so."

Massenburg et al. v. Denison et al., 71 Fed. Rep 619

Ruckman v. Gory, 129 U. S. Rep. 387

"Where a party is in possession of land, he may wait until his title and possession are attacked before setting up equitable demands without being chargeable with laches."

"Laches which will bar a suit in equity depends on the peculiar circumstances of each case, and where the complainant's inaction does not appear to have worked injury to anyone, and it is not shown that there was any occasion for more promptly asserting his rights, the defense will not prevail."

Hanchett v. Blair, 100 Fed. Rep. 817

When an owner stands by and sees a third person sell property as his own, without asserting his own title or giving the purchaser any notice of it, he is estopped as against such purchaser from asserting it afterwards.

Vilas v. Mason, 25 Wis. 310
Guffey v. O'Reiley, 88 Mo. 418
Markham v. O'Connor, 52 Ga. 183
Steel v. Smelting Co. 106 U. S. 456

It cannot be denied that it was negligence upon the part of Ben Holladay to have acquiesced in the transfer of all of the real property owned by the

Oregon Central Railroad Company on the 28th day of March, 1870 in the State of Oregon, to the Oregon & California Railroad Company, in view of the fact that as has been shown—see pages 47 to 62—supra—that he had himself as a member of the firm of Ben Holladay & Co., a co-partnership and as an individual, on the same day signed an agreement in which he agreed to convey unto the Oregon Central Railroad Company all of the real estate then owned by him in the State of Oregon, especially in Multnomah and Clackamas Counties. That he had knowledge of and acquiesced in such conveyance—see top of page 1487 of transcript, Vol. III.

IX.

WAS THE PURCHASE OF LAND BY OREGON CENTRAL RAILROAD COMPANY, AN ULTRA VIRES ACT?

Counsel for defendant claim that the acquiring of real property by the Oregon Central was ultra vires and that a court of equity will not specifically enforce the contract of March, 28, 1870 signed by Ben Holladay and Ben Holladay & Company.

It has been clearly established hereinbefore that it was the intention of Ben Holladay and Ben Holladay & Company when signing this agreement of March 28, 1870, to convey or at least to agree to convey unto the Oregon Central the lands in dispute. (See pages 62 to 83 *supra*)

Complainant has clearly identified the lands described as being the lands Ben Holladay and Ben Holladay & Company intended to convey or agree to convey unto the Oregon Central when signing such agreement. (see pages 62 to 70 supra.)

Complainant has also shown that the said lands were purchased for the use and benefit of Ben Holladay & Co. for use in construction of the Oregon Central and that they were so used in connection with the building of the first 20 miles of railroad for said Company. (see pages 31 to 43 supra.)

It has also been shown that the Oregon & California Railroad Company has acted and relied upon this agreement of March 28, 1870, for more than forty years and for more than thirty-nine years has paid the taxes on the lands in dispute, in reliance upon such agreement and its deed of March 29th, 1870, and that during the same period of time no one claiming under or by virtue of the residuary clause of Ben Holladay's will has ever denied the complainant's rights to these lands, paid a dollar of taxes thereon, had any possession thereof, or made any claim of any kind thereto.

The powers granted unto the Oregon Central were, among other things, to construct a railroad, with all the necessary branches, etc.

See Exhibit 28, which is the charter of the Oregon Central Railroad Company. (See pages 1337 to 1340 incl.—Vol. II of transcript)

By the provisions of its charter, the Oregon Central was empowered to construct a railroad. By virtue of this general power it also was vested with an implied power to do all things necessary and convenient in the construction of the said railroad.

> "Corporations have implied power to take real estate the same as individuals. By this it is meant that corporations have such power to the extent that is necessary to effectuate the purposes of their creation."
>
> Thompson on Corporations, Sec. 2381, Vol 3.
>
> "Power to purchase, possess and dispose of such real and personal property as may be *necessary and convenient*, to carry into effect the object of the incorporation." (This provision has never been amended or repealed and is still the law in Oregon—see Article 4 of Sec. 6686 L. O. L.)
>
> Deady's General Laws of Oregon, Sec. 5, Art. 4, p. 525.

It is not necessary that a showing be made that the Oregon Central could have constructed its railroad without the above described lands.

> "Under this rule the real estate need not be necessary in the sense of being indispensable, but if it is convenient and proper under all the circumstances it is sufficient."
>
> Richardson v. Massachusetts Charitable Assn. 131 Mass. 174
>
> "Land is said to be necessary when it is

obviously appropriate and convenient to carry into effect the franchise granted."

State v. Hancock, 35 N. J. L. 537

"The grant of corporate franchises will not be extended beyond the letter and spirit of the charter, yet it is not to be so strictly construed as to defeat the object of the grant, besides the powers expressly granted such as are strictly incidental but necessary to the object of the grant, are implied."

Camden & Emboy R. R. Co. v. Commissioners, 23 N. J. L. 510

The fact the the Oregon Central found that it would aid them in the construction of the railroad to acquire these lands or that its contractors found it necessary to do so (which, it has been made very clear, it did through Ben Holladay & Company) is not to be construed as an *ultra vires* act, simply because it appears that after the railroad was completed these lands were not necessary for operating purposes. Furthermore, these lands were taken over as a part of the settlement made between Ben Holladay & Co. and the Oregon and California Railroad Company.

"When, where a corporation acquired land for its legitimate purposes, and in good faith purchased more than it needed, this did not render the purchase of any excess void, but the corporation could afterwards sell the surplus."

Lauder v. Peoria &c., 71 Ill. Ap. 475.

If the court concludes, which it no doubt will after an examination of the evidence which has been referred to hereinbefore repeatedly, that these lands were purchased by Ben Holladay & Company for use in the construction of the Oregon Central, then it could go further and conclude that while the deeds read from James Grindley and Gardner Elliott to Ben Holladay & Company, in reality the consideration was paid by the Oregon Central and for that reason, in equity at least, the title vested in the Oregon Central at the time the agreement of March 28th, 1870, was executed, and the settlement made with Ben Holladay & Co.

There is nothing in the argument that these lands are located at some distance from the Oregon Central railroad tracks. What right has counsel for the defendant to assume, that the complainant will never have use for these lands, simply because they are not a part of its right of way. There being no express prohibition in complainant's charter preventing its acquiring these lands in the manner and for the purposes as has hereinbefore been shown, by what rule of law is it to be deprived of them? The court certainly will not do so upon a mere statement of counsel for the defendant to the effect that they are not now necessary for operating purposes, or that they were not so necessary at the time they were acquired. But they were reasonably necessary for construction purposes when acquired by Ben Holladay & Co. and as

an incident to the settlement with that firm, could be conveyed to the Oregon Central Railroad Company.

In view of what has just been stated, defendant cannot question the right of the complainant to hold title to these lands on the theory that it is an *ultra vires* act.

> "Even as against an express constitutional or statutory prohibition, a corporation will hold a good title until it is invalidated in a direct proceeding by the state for such purpose."
>
> Louisville School Board vs. King, 32 Ky. L. 687

A great many authorities are cited by counsel for the defendant in an attempt to show that the Oregon Central could not, under its charter, have acquired the lands in dispute. None of these authorities, however, when carefully scrutinized, hold that where it appears that such lands were useful or convenient to the corporation in accomplishing the purposes for which it was created, that it is an *ultra vires* act.

The theory of the defendant seems to be that this Court cannot decree that the complainant is the owner of the lands in dispute for the reason that to do so would be using the powers of a court of equity to aid the complainant to violate the law by obtaining title to real property which it has no power to hold.

This doctrine has reference to a situation where an attempt is made to acquire lands that are not necessary or convenient to the carrying out of the purposes for which the corporation was created, as in the present case, to build a railroad.

In Case vs. Kelly, 133 U. S. 23, cited by counsel for defendant, an attempt was made by a corporation to compel certain persons (who had solicited donations of land, representing to the donors of said land that they were for the purpose of aiding the construction of a railroad) to convey such lands unto the corporation upon the theory that they were holding the lands in trust for the corporation. There was no showing in this case that the lands were actually used in any manner whatever in connection with the building of the railroad, or agreed to be conveyed in settlement of a construction contract as here nor was there any showing that the defendants had ever acknowledged by any writing, as was done in the case at bar, that the lands were to be the property of the company. A reading of this case discloses that it is not in point, and the same may be said of numerous other cases cited by counsel for defendant on this proposition. Time will not permit of any detailed discussion of the other authorities cited, and we do not believe it will be necessary.

X.

WAS THE OREGON CENTRAL LEGALLY ORGANIZED.

Counsel for defendant has raised every technical point possible in order to detract the Court's attention from the real merits herein, and has gone so far as to allege that the Oregon Central was not in law a corporation. See paragraph 5 of defendant's amended answer. Page 27 of transcript, Vol. I.

Where a private corporation has an existence in fact and is acting under color of law, its right to exist as a legal entity cannot be attacked collaterally by private parties, unless it is shown that such corporation has been declared to be an illegally organized corporate body in a direct proceeding instituted by the state for that very purpose.

Cook on Corporations, Sec. 637, 1804.
Central Ry. Co. v. Union Ry. Co. 144 Ala. 639
Leavenwood v. McGee, 50 Or. 233.

XI.

REFORMATION.

In this connection counsel for defendant proceeds upon the theory that complainant cannot prevail in this suit because it has failed to allege that there was a mutual mistake made in the preparation of this agreement of March 28, 1870, and that the agreement of the parties thereto was intended to

be different than as it was made; and further, that it failed to allege and prove that the mistake was not due to gross negligence on the part of the Oregon Central Railroad Co., complainant's grantor.

In Paragraph 7 of the bill of complaint (See page 5 of transcript, Vol. I) it is alleged very particularly that the lands in dispute were purchased by Ben Holladay & Co. to enable them to carry out their contract for the construction of the Oregon Central railroad; that these lands were purchased for the purpose of acquiring mill sites, and for the timber thereon, for ties and bridge timbers.

In Paragraph 8, (page 7 of transcript, Vol. I) immediately following, it is alleged that on the 28th day of March, 1870, a general settlement was had between Ben Holladay & Co. and the Oregon Central Railroad Co. of and concerning the performance of said contracts, (having reference to the contracts made by A. J. Cook & Co., which were acquired later by Ben Holladay & Co., all of said contracts being set out, and their connection with the agreement of March 28, 1870, explained in Paragraph 6 of complaint (pages 4 and 5 of transcript, Vol. I) and that an agreement was entered into, constituting a general settlement, which is set out in full and made a part of said Paragraph 8 of complainant's bill of complaint (page 7 of transcript, Vol. I). An analysis of the provisions of this agreement discloses that it was the intention

of the parties to reimburse Ben Holladay and Ben Holladay & Co. for all sums of money paid out in the construction of the railroad. See the following provisions of this agreement:

"In consideration of the cancellation this date by the Oregon Central Railroad Co. of all certain contracts in writing heretofore existing between said company and the undersigned in relation to the construction of a railroad, and the agreement of such company to pay the undersigned for all moneys paid out, it being a part of the arrangement that all the property hereinafter specified should be transferred and delivered to said company, and all leases and all property of every name and nature now owned by us in the possession of Ben Holladay & Co. in the State of Oregon, principally in Multnomah and Clackamas Counties, now and heretofore used by us in the construction of the railroad. It being the intention of this conveyance to transfer to the said Oregon Central Railroad Co. all property, real and personal, of every name and nature now owned or possessed by the undersigned in the State of Oregon."

It is made clear by the above provision that the purpose of this agreement was to pay Ben Holladay and Ben Holladay & Co. all sums of money which they had paid out in constructing the Oregon Central railroad.

These provisions were evidently construed by counsel for defendant to mean that the Oregon

Central Railroad Co. was simply to pay Ben Holladay & Co. the sums paid out, and that Ben Holladay & Co. was to keep the property purchased in connection with the building of said road. In other words, it would seem to be the theory of counsel for defendant that Ben Holladay and Ben Holladay & Co. were to be paid from $800,000 to $1,000,000 simply for the labor performed in and about the construction of said road, and for their personal services. Such a theory cannot be placed upon any sound reasoning, even though it were not clearly negatived by the contract itself. It is stated very plainly in this contract that it was a part of the arrangement to transfer, convey, and deliver up all property, both real and personal, of every name and nature, then owned by the undersigned in the State of Oregon. This agreement being set out in a bill of complaint becomes a part thereof, and contains allegations of fact to be proven.

The only uncertain provision of this agreement (which however has been removed by the evidence referred to hereinbefore) is that it does not specifically describe the real estate to be conveyed, but in general terms conveys or agrees to convey all of the real estate "owned by the undersigned" in the State of Oregon at that time.

A writing agreeing to convey all of the real property of a grantor in the State of Oregon, especially in Multnomah and Clackamas Counties,

is not void as being too indefinite and uncertain in its description of the property, to be enforced, but will pass title to all of the real property of the grantor within said counties and state.

Wilson v. Boyce, 92 U. S. 325
Jones, Law of Real Property, Vol. I, Sec. 347
Tiffany, Law of Real Property, Vol. I, Sec. 387

Complainant has clearly proven that the lands in dispute here were lands owned by Ben Holladay and Ben Holliaday & Co. on the 28th day of March, 1870, and that they were a part of the property purchased by Ben Holladay & Co. in connection with the building of the Oregon Central railroad.

Complainant in its prayer asks that a decree be entered adjudging and decreeing that complainant is the owner in fee simple of the said real premises, and of the whole thereof, and that the defendant is not the owner thereof, or any part thereof, and is not entitled to the possession thereof, or any part thereof. It also has asked that the agreement of March 28, 1870, be reformed and specifically enforced.

The position of counsel for defendant no doubt is that the complainant is precluded from having the decree that the lands in dispute are the property of complainant, because it has asked that the court also decree that the contract be reformed and specifically enforced. Having shown, however,

that it is the owner of these lands by reason of this general settlement, as evidenced by the agreement of March 28, 1870, in a suit to quiet title, complainant is entitled to a decree requiring that the defendant execute a formal deed to these lands, embodying therein the legal description. When complainant asks that this agreement be reformed, it was not basing its right to such relief upon any mistake in the sense contemplated by the defendant. Therefore the numerous authorities cited by defendant relative to the doctrine of reformation do not apply. The instrument should be reformed, so as to make the description specific and as so reformed, the same should be specifically enforced, as a contract to convey.

Is the agreement of March 28, 1870 a sufficient writing in equity to convey title to real property, or to entitle the vendee to enforce the same in equity?

> "Contracts may be enforced, where, from some default, or some lack of legal formality or condition no action at law can be maintained. There are two general classes of such cases. * * * The second class embraces contracts which are not valid in law, which the law does not treat as contracts at all, but which equity regards as binding in conscience, and enforces by its remedy of specific performance. The legal invalidity may result from the non-observance of some statutory requirements concerning the mode of making the agreement, or from certain doctrines of

the common law, irrespective of statute, affecting its terms or its subject-matter.

Pomeroy's Equity Jurisprudence, Vol. 3, Sec. 1297

An unacknowledged deed although not entitled to record, passes title, and is a good conveyance except as to a bona fide purchaser for value, and is good between the parties.

Manadas v. Mann, 14 Or. 450
Security Trust Co. v. Lowenberg, 38 Or. 163
Eadie v. Chambers, 172 Fed. 75

A contract containing the essential terms of sale, although not complete, is sufficient within the statue of frauds.

Stubblefield v. Embler, 33 Or. 450
Salmon Falls Mfg. Co. v. Goddard, 14 How. 446

After establishing the existence of the agreement of March 28, 1870, and having identified the lands in dispute as being the lands to be conveyed to the Oregon Central Railroad Co. by such agreement; and having shown that complainant has relied upon such agreement for more than thirty years, and holds a conveyance from the Oregon Central of date March 29th, 1870, and that the defendant claims to hold the legal title by reason of the residuary clause in the will of Ben Holladay, deceased, and that the agreement of March 28, 1870, which may be specifically enforced as being fully performed on the part of complainant, complainant is entitled, under and

by virtue of Section 516 of Lord's Oregon Laws, to the relief prayed for in its bill of complaint.

SECTION 516:

"Any person claiming an interest or estate in real estate not in the actual possession of another, may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates."

> "A suit to ascertain and quiet title under this section extends to and involves all grounds of controversy between the parties as to title to the premises, and with the final decree therein, all matters affecting such title are determined."
>
> Starr v. Stark, 1 Sawyer, 270
>
> "A suit to remove a cloud from title may be maintained, even if the instrument constituting the claim is void on its face."
>
> Mount v. McAuley, 47 Or. 45

This section authorizes the maintenance of a suit whether plaintiff's title is deemed legal or equitable, to determine an adverse claim.

> Kollock v. Bennett, 53 Or. 395

Complainant is clearly entitled to a decree requiring the defendant to execute a good and sufficient deed to the lands in dispute, as prayed for in its bill of complaint.

CONCLUSIONS.

It has been the purpose of complainant to direct the Court's attention to certain matters of evidence herein which it believes conclusively establishes:—

FIRST: That on the 28th day of March, A. D. 1870, an agreement was executed by the firm of Ben Holladay & Company and Ben Holladay agreeing to convey unto the Oregon Central the lands described.

SECOND: That it was the intention of Ben Holladay and Co. and Ben Holladay and others when affixing their signatures to this agreement, to include these lands within its terms, and to make it clear that such was their intention complainant has shown:

(a) that the lands were purchased for the use and benefit of Ben Holladay & Co. in the construction of the Oregon Central Railroad and that they would not have been purchased at the time they were, by Ben Holladay or by Ben Holladay & Company had it not been necessary for them to have secured the lands for saw mill sites and timbers for ties and bridges, for use in the construction of said railroad:

(b) that saw mills were built upon the said lands by Ben Holladay & Company and that all of the timber thereon was manufactured into ties and bridge timbers for use in building the first 20 miles of railroad of the Oregon Central Railroad Company;

(c) that the writing itself when considered

in connection with the other writings appearing upon pages 160 to 208 of Exhibit 7, (pages 380 to 440 of transcript, Vol. I), and with the depositions and affidavit of Ben Holladay in the dissolution suit, clearly identifies these lands in dispute with the contract and shows beyond a reasonable doubt that they were purchased for the use and benefit of Ben Holladay & Co. for use in the construction of the Oregon Central railroad, and that they were paid for by the said Company in the final settlement made March 28th, 1870, with Ben Holladay & Co.

THIRD: That complainant went into possession of the lands on the 29th day of March, 1870, by virtue of a deed of conveyance from the Oregon Central Railroad Company and relying upon the said agreement of March 28th, 1870, and deed of March 29th, 1870, and in further reliance upon said agreement and deed has paid the taxes thereon for more than thirty years, aggregating $1773.79, and has made permanent improvements thereon of the value of $500.00, all relying upon the said agreement of March 28th, 1870, and the deed of March 29th, 1870, under color and claim of title and that its possession has been open, notorious, continuous and adverse ever since March 29th, 1870.

Counsel for the defendant have not presented one single item of evidence in the case aside from the testimony of Orrin E. Battin in connection with the complainant's claim of adverse possession. They have discussed at great length many academic prin-

ciples of law relative to the exclusion of certain classes of evidence, in an attempt to keep from the records certain matters which are so convincing as to leave no doubt whatsoever as to the existence, execution and delivery of this agreement of March 28, 1870, and that it was the intention of Ben Holladay and Ben Holladay & Company when executing said agreement to convey or agree to convey unto the Oregon Central the lands in dispute.

Complainant submits that it has clearly shown by the matters and things hereinbefore set forth that it is entitled to the relief as prayed for in its bill of complaint, that the decree of the court below should be reversed and a decree entered in this court in accordance with the prayer of the bill and for costs and disbursements.

Wm. D. Fenton, Kenneth L. Fenton

Ben C. Dey, Alfred S. Dibble

Attorneys for Complainant-Appellant.